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No. 93-

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1993**

CITY OF NEW YORK; DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY; CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Petitioners,

- against -

KAM SHING CHAN, et al.,

Respondents.

## PETITION BY MUNICIPAL PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 30, 1993.

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## QUESTIONS PRESENTED

Title I of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301, et seq. ("HCDA, Title I"), consolidated all pre-existing urban renewal and community development funding programs into one single grant program. Its labor standards provision, which is codified at 42 U.S.C. § 5310, provides that all laborers employed on construction work financed by Title I funds shall be paid prevailing wages in accordance with the Davis-Bacon Act. The questions presented are:

1. Whether under Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) and Suter v. Artist M, __ U.S. ___, 112 S. Ct. 1360 (1992), HCDA, Title I confers upon laborers a right, enforceable under 42 U.S.C. § 1983, to receive prevailing wages?

2. Where Congress, when it enacted HCDA, Title I and numerous other Davis-Bacon Related Acts, also incorporated an administrative enforcement mechanism to remedy violations of the labor standards of these acts and where this Court in Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981), recognized that the creation of a private right of action for laborers seeking the payment of Davis-Bacon wages would undercut this administrative enforcement scheme, whether the Second Circuit erred in determining that Congress did not intend to preclude a 42 U.S.C. § 1983 remedy for violations of HCDA, § 5310?

3. Where the City of New York and the Chinese-American Planning Council ("CPC"), a private not-for-profit organization, entered into contracts pursuant to which CPC was to rehabilitate certain City-owned property, and

where the contracts provided that CPC had to comply with all applicable federal laws, whether CPC's conduct in paying wages constituted state action where the City placed a per day per worker funding cap in the contracts which was allegedly insufficient to permit CPC to pay prevailing wages?

## PARTIES

The City of New York and the Department of Housing Preservation and Development of the City of New York, who were defendants below, are petitioners before this Court ("municipal petitioners").

Chinese-American Planning Council, Inc., also a defendant below, is filing a separate petition for a Writ of Certiorari.

Respondents, plaintiffs below, are:

Kam Shing Chan; Kam Tai Chan; Jing Ye Chen; Shan Non Chiu; Bak Lok Chu; Kok Kun Chu; Israel Gonzalez; Sui Bin Huang; Jian Ning Jiang; Kam Fai Kwok; Moon Shuen Kwong; Wei Xiang Lee; Yang I Lee; Young Shi Lee; Bing Zhao Li; Hao Hui Li; Kei Man Li; Wai Tai Li; Chi Kwong Liu; Jack Ye Louie; Sheng Hua Lu; Tian Guang Mai; Cheuk Mink Ng; Kin Chung Ng; Kin Hin Ng; Shun Gao Shen; Ten Jen Shen; Hau Wing Sin; Vein Dinh Sintruong; Wing Shing Tse; Wai Man Wan; Kong Htyan Wu; Xu Ming Wu; Guo Xuan; Yue Nam Zhu.

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(1) Congress intended that HCDA, § 5310 and the prevailing wage provisions of all Davis-Bacon Related Acts be enforced by the Department of Labor. . . . . 12

(2) The Second Circuit's reasoning gives workers an unprecedented right of action under Section 1983 to enforce not only the Davis-Bacon wage provision of HCDA, Title I but also of several other Davis-Bacon Related Acts that contain identical or similar wage provisions. . . . . 20

(3) In determining that HCDA, § 5310 created an enforceable right, the Second Circuit failed to interpret that provision in the context of the rest of HCDA, Title I as required by Suter v. Artist M., ___ U.S. ___, 112 S.Ct. 1360, 1370 (1992). Further, the Second Circuit's decision conflicts in principle with Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 774 (1st Cir., 1986). . . . . 24

(4) **Lower Courts need guidance as to the proper framework to apply in determining whether a federal statute creates a right enforceable under Section 1983.** . . . . . 27

(5) **The Second Circuit has expanded the state action doctrine and has imposed on all state governing entities an obligation to ensure that government contracts, on their face, are sufficiently funded to permit the contractor to pay Davis-Bacon wages, where applicable.** . . . . . 29

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## PETITION BY MUNICIPAL PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The municipal petitioners, the City of New York and the Department of Housing Preservation and Development of New York City, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on July 26, 1993.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, entered July 26, 1993, and from which review is sought, is reported at 62 USLW 2089 (2d Cir., 1993). A copy is reprinted in the Appendix to this Petition at page A1. The opinion and order of the United States District Court for the Southern District of New York (Ward, D.C.J.), entered June 5, 1992, as modified by an opinion and order of the District Court entered September 8, 1992, is reported at 803 F. Supp. 710 (S.D.N.Y., 1993). A copy is reprinted in the Appendix at page A26. The report and recommendation of Magistrate Judge Francis dated January 6, 1992 is unreported and is annexed to the Appendix at page A96.

## JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered July 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

## STATUTORY PROVISIONS

This case arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and involves the interpretation of Section 5310 of Title I of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301, et seq. References in this petition are further made to the Davis-Bacon Act, 40 U.S.C. § 276(a); Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix, 64 STAT. 1267; Miller Bond Act of 1935, 40 U.S.C. § 270a; Elementary and Secondary Education Act, 20 U.S.C. § 1232b; Headstart, Economic, Opportunity and Community Partnership Act of 1974, 42 U.S.C. § 2992a; Energy Conservation and Production Act, 42 U.S.C. § 6881(h); Commercial Fisheries Research and Development Act of 1964, 16 U.S.C. § 779; Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(a); Domestic Volunteer Services Act, 42 U.S.C. § 5046; Emergency Community Facilities Act of 1970, 42 U.S.C. § 3107; Energy Security Act, 42 U.S.C. § 8775; National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. § 954(n); Older Americans Act of 1965, 42 U.S.C. § 3027(a)(14)(D); Solid Waste Disposal Act, 42 U.S.C. § 6979; and Hospital Survey and Construction Act, 42 U.S.C. § 291. These statutes have been reprinted in the Appendix, beginning at page A109. References are also made to 29 C.F.R. Parts 1 and 5 (1974). Relevant portions of these regulations have been reprinted in the Appendix, beginning at page A121.

## STATEMENT OF THE CASE

### Basis for Federal Jurisdiction

This action was commenced pursuant to 42 U.S.C. § 1983 and the jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1337.

### Background Facts

The City of New York and co-petitioner Chinese-American Planning Council ("CPC"), a private non-profit organization, entered into three annual contracts pursuant to which CPC was to perform "construction, repair and rehabilitation" work on certain city-owned properties (72-194, 317-421, 939)[1].

The contracts served two significant purposes: (1) to preserve and develop City housing and (2) to provide training and employment opportunities to persons historically at risk for unemployment, such as recent refugees, immigrants, ex-addicts, homeless persons and long-term welfare recipients. Under the contracts, CPC was responsible for hiring and paying workers to perform the contract work. It was also required to provide its workers with work experience, training, counseling and other social services (75, 94-95, 342-939). For the above

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[1] Numbers in parentheses refer to pages of the Appendix filed in the Court of Appeals for the Second Circuit; numbers in parentheses preceded by the letter "A" refer to the Appendix to this Petition.

services, the City agreed to pay CPC $90-$95 per worker per day (99, 348, 939bb).

Although the contracts required CPC to comply with all federal laws, including the payment of prevailing wages where applicable (89, 129, 337, 382), there was no pre-contract determination by the parties as to whether the work performed by respondents constituted work covered by the Davis-Bacon Act.

The contracts were funded with federal community development grants furnished under the Housing and Community Development Act of 1974 ("HCDA"), 42 U.S.C. § 5301 et seq.. The HCDA consists of eight chapters that cover a broad range of Federal housing and urban development programs. Title I of the HCDA, known as the Community Development Assistance Act of 1974, codified at 42 U.S.C. §§ 5301 through 5320, consolidates all pre-existing urban renewal and community development programs into one single program where federal funding is distributed to localities in the form of block grants. Title I funds may be used for a wide range of community development activities, including housing development and preservation and the provision of certain social services.

HCDA, Title I is a Davis-Bacon Related Act. Its labor standards provision, which is set forth in 42 U.S.C. § 5310, provides, in pertinent part:

> All laborers and mechanics employed by contractors or subcontractors in the

> performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. § 276a-276a-5)... The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan No. 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and Section 276c of Title 40.

Respondents, laborers hired by CPC to perform work under the contracts, allege that CPC failed to pay them prevailing wages in violation of HCDA, § 5310. They commenced this action pursuant to 42 U.S.C. § 1983 and pursuant to an asserted implied right of action under HCDA, § 5310, seeking back wages, damages and attorneys' fees. Additionally, respondents interposed pendent state claims (15-44).

The City and CPC moved separately for dismissal of respondents' federal claims arguing that (1) there was no implied right of action under HCDA, § 5310; (2) a 42 U.S.C. § 1983 action could not be maintained because CPC, in paying wages, was not acting under color of state law; and (3) HCDA, Title I did not create a right, enforceable under § 1983, to receive prevailing wages (45-605).

## The Report of the Magistrate Judge

In a Report and Recommendation dated January 6, 1992, Magistrate Judge James C. Francis IV, recommended that the motions to dismiss be granted in their entirety (A96).

## The Decision of the District Court

In an opinion and order dated June 5, 1992, the District Court modified the Magistrate Judge's findings and recommendations. The District Court granted defendants' motion to dismiss those claims brought pursuant to an asserted implied right of action under HCDA, § 5310. It, however, denied the motions to dismiss the 42 U.S.C. § 1983 claims (A26-78).

In an opinion and order dated September 8, 1992, the District Court, pursuant to 28 U.S.C. § 1292(b), certified for interlocutory appeal so much of its order as denied the motions to dismiss the § 1983 claims (A79). By order entered November 10, 1992, the Court of Appeals for the Second Circuit granted the City and CPC permission to appeal (A25).

Thereafter, on January 5, 1993, the District Court entered a final judgment, pursuant to Fed. R. Civ. P. 54(b), dismissing respondents' implied private right of action claims under HCDA, § 5310 (A94). Respondents then filed a notice of appeal and, thereafter, both appeals were consolidated.

## Decision of the Court of Appeals

The Second Circuit affirmed the District Court's order (A1-24). With respect to respondents' 42 U.S.C. § 1983 claims, the Court found that if respondents could prove their allegations that the City placed a per worker per day funding cap which did not permit CPC sufficient funds to pay prevailing wages, then CPC's conduct in failing to pay prevailing wages would constitute state action (A21-24).

Then, the Second Circuit held that under either the analysis set forth in Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) or in Suter v. Artist M., __ U.S. __, 112 S.Ct. 1360 (1992), HCDA, § 5310 conferred upon respondents a right, enforceable under 42 U.S.C. § 1983, to receive prevailing wages.[2] The Court found that laborers were the intended beneficiaries of Section 5310

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[2] Under Wilder, the determination of whether a federal statute creates a right enforceable under Section 1983 "turns on whether the provision in question was intend[ed] to benefit the putative plaintiff". Wilder, 496 U.S. at 509. If there was such an intent, then an enforceable right is created unless (1) the statute reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the government or (2) the interest plaintiff asserts is "too vague and amorphous" to enforce. Id. However, even if it is determined that an enforceable right does exist, there is no relief under Section 1983 if there is a "comprehensive enforcement scheme'" under the statute which demonstrates congressional intent to preclude enforcement of that right under Section 1983. Id.

Under Suter, the inquiry is whether Congress in enacting the statute "unambiguously conferred" a right enforceable under Section 1983.

(A17). It reasoned that "[w]hile the ultimate goal of Congress in enacting the HCDA was, as a whole, the development of viable urban communities by providing decent housing and expanding economic opportunities for persons of low and moderate income, there can be no question that the provision for payment of a certain minimum wage confers its principal benefit on the wage earners" (A17). Next, the Court found that Congress intended to impose a binding obligation on the recipients of Title I funds to pay prevailing wages because Congress employed the term "shall be paid" in Section 5310 (A17).

Finally, the Second Circuit found that although Congress specifically adopted an administrative enforcement mechanism to enforce Section 5310, that enforcement scheme was not sufficiently comprehensive so as to evince Congressional intent to preclude a Section 1983 remedy (A18-20). For all the above reasons, the Second Circuit affirmed the denial of the motions to dismiss respondents' Section 1983 claims.

The Second Circuit found, however, that respondents' claims brought pursuant to an implied right of action under HCDA, § 5310 were properly dismissed. It reasoned that Congress intended that Section 5310 should be enforced through the administrative enforcement scheme set forth in Section 5310 and that although "there was no statement that these would be the exclusive means of enforcement, there simply was no indication that, along with the cited regulatory mechanism, Congress also

intended to authorize laborers to bring private suits." (A13-14).[3]

## REASONS FOR GRANTING THE WRIT

The Second Circuit is the first Court to hold that laborers may bypass the administrative enforcement scheme before the Department of Labor and seek enforcement of Davis-Bacon wage standards in a 42 U.S.C. § 1983 action. Its holding is not limited in its application to HCDA, § 5310 since at least ten other Davis-Bacon Related Acts contain identical or similar prevailing wage provisions. This holding is contrary to Congress' intent that HCDA, § 5310 and all other Davis-Bacon Related Acts be enforced by the Department of Labor pursuant to Reorganization Plan No. 14 of 1950 and the regulations promulgated pursuant thereto. In Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981), this Court recognized that if Courts were permitted to make de novo Davis-Bacon coverage and classification determinations, this "elaborate" administrative enforcement scheme would be disrupted and the "uniformity fostered by those regulations would be

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[3] The implied private right of action analysis is different from the Section 1983 inquiry. Whether a statute creates an implied right of action is analyzed under the framework set forth in Cort v. Ash, 422 U.S. 66 (1975). If Congress has expressly provided other remedies for a particular statute, no other remedies are to be implied unless there is evidence of Congress' intent to the contrary. Under the Section 1983 inquiry, however, if a statute creates an enforceable right, that right is enforceable pursuant to Section 1983 unless Congress has affirmatively withdrawn a Section 1983 remedy.

short-lived." Id. at 783. Thus, this case raises important issues which should be resolved by this Court.

Further, the Second Circuit interpreted HCDA, § 5310 in isolation, and failed to read it in the context of the rest of Title I as required by Suter v. Artist M., __ U.S. __, 112 S.Ct. 1360, 1370 (1992). Also, the Second Circuit's decision that laborers were the intended beneficiaries of HCDA, § 5310 conflicts in principle with the First Circuit's decision in Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 774 (1st Cir., 1986). The First Circuit there determined that minority citizens of a city were not the intended beneficiaries of 42 U.S.C. § 5309(a), the anti-discrimination clause of Title I, because Title I was enacted not for their especial benefit but for the benefit of the communities and localities to whom the funds would be distributed.

Moreover, a Writ should be granted because lower courts need guidance as to the proper framework to apply in determining whether a federal statute creates an enforceable right under 42 U.S.C. § 1983. Several circuits have questioned the viability of Wilder after Suter and Justice Blackmun, in his dissenting opinion joined by Justice Stevens in Suter, opined that the majority had departed from the Wilder framework. 112 S.Ct. at 1375, 1377.

Finally, the Second Circuit has expanded the state action doctrine by finding state action in this case based on the allegations that the City placed a per worker per day

funding cap in the contracts which did not permit CPC sufficient funds to pay prevailing wages.

(1)

**Congress intended that HCDA, § 5310 and the prevailing wage provisions of all Davis-Bacon Related Acts be enforced by the Department of Labor.**

This case raises important and significant issues because it is the first time that a Court has recognized that any Davis-Bacon Related Act confers upon laborers a right, enforceable under 42 U.S.C. §1983, to be paid prevailing wages. As set forth below, the recognition of such a right is completely contrary to congressional intent that Section 5310 and the wage provisions of all Davis-Bacon Related Acts be enforced by the Department of Labor.

Congress did not intend to create an enforceable right when it enacted Section 5310, but rather a "generalized duty" to be enforced by the Department of Labor. See, Suter, supra, 112 S.Ct. at 1368-1370. When Congress incorporated the Davis-Bacon wage standards into Section 5310, it also adopted the Davis-Bacon administrative enforcement scheme set forth in Reorganization Plan No. 14 and the regulations promulgated by the Secretary of Labor pursuant thereto. 29

C.F.R. Parts 1, 3, 5, 7.[4] At that time, this administrative enforcement scheme included, among other things, the right of laborers to file complaints of underpayment of wages with the Department of Labor, 29 C.F.R. § 5.6(3) (1974)(A124); (2) a dispute resolution procedure, which included a hearing before an Administrative Hearing Officer in which employees could participate as interested parties, 29 C.F.R. §§ 5.11 (1974)(A127); (3) the right of an employee, as an interested party, to appeal to the Wage Appeals Board. 29 C.F.R. § 5.11 (1974); and (4) judicial review under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. of certain decisions of the Wage Appeals Board, including coverage and classification determinations. See, e.g., Building and Construction Trades Department, AFL-CIO v. Department of Labor, 932 F.2d 985 (D.C. Cir., 1991); Holloway Construction v. Wage Appeals Board, 825 F.2d 1072 (6th Cir., 1987).[5]

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[4] HCDA, § 5310 provides that the "Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan No. 14 of 1950." The regulations promulgated by the Department of Labor to enforce the Davis-Bacon Related Acts incorporate all the enforcement mechanisms available for violations of the Davis-Bacon Act itself, with the exception of the Miller Bond Act of 1935. The Miller Bond Act, 40 U.S.C. § 270(a), provides persons furnishing labor or materials with a limited judicial remedy allowing them to "bring suit against the contractor on the payment bond ... require[d] ... under certain federal contracts." Universities Research Ass'n v. Coutu, 450 U.S. at 758.

[5] While a number of circuits have held that certain determinations of the Department of Labor are reviewable, this Court has not expressed a view on this matter except to note that the correctness of a wage rate

(continued...)

If the Department of Labor found a wage violation, it could have (1) directed the federal agency administering the federal grant to suspend payment and to withhold sufficient funds to compensate the employees (29 C.F.R. § 5.9 (1974))(A126); (2) requested the contractor to make restitution to the employees (29 C.F.R. § 5.10(a) (1974))(A126); (3) deemed the contractor ineligible for contracts funded by Davis-Bacon Related Acts for three years (29 C.F.R. § 5.6(b) (1974))(A125); and (4) referred the matter for criminal prosecution. 29 C.F.R. § 5.10(b) (1974)(A127).[6]

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[5] (...continued)
determination made by the Secretary of Labor pursuant to 29 C.F.R. § 1(a) is not subject to judicial review. Coutu, 450 U.S. at 761, n. 10.

[6] Under the present regulations, the dispute resolution procedure which includes a hearing before an Administrative Law Judge ("ALJ") is instituted by the Administrator of the Department of Labor's Wages and Hours Division on the employee's behalf. After the ALJ renders a decision, the employee may either allow the Administrator to continue to proceed on his or her behalf, or, the employee, as an interested party, may appeal to the Wage Appeals Board. 29 C.F.R. § 5.11 (b) (3) (1993); 29 C.F.R. § 7.2(b) (1) (1993). The rest of the administrative scheme is essentially the same, including the right of anyone, including an employee, to file a complaint. See, 29 C.F.R. § 5.6(a)(3)(1993) ("Complaints of alleged violations shall be given priority").

In fact, there is a proceeding presently pending before the Department of Labor regarding respondents' claims of underpayment. The Department of Labor has issued a ruling requesting that CPC provide plaintiffs with restitution. CPC has requested a hearing on this matter pursuant to 29 C.F.R. § 5.11.

When Congress incorporated the Davis-Bacon standards into Section 5310, it was its understanding that Davis-Bacon wage standards were enforceable pursuant to the above administrative enforcement scheme and that, with the limited exception of the Miller Act remedy, no private right of action existed to enforce Davis-Bacon wage standards. See, Coutu, 450 U.S. at 778 (this Court noted that both proponents and opponents of unsuccessful proposed amendments to permit judicial review under the Davis-Bacon Act have both assumed that no judicial review was previously permitted); see, also HR 2216, 100th Cong. 1st Sess. (1987) (505-506) (Congressman Murphy, commenting on a proposed amendment to the Davis-Bacon Act which would have permitted judicial review and civil actions by employees, stated "[i]t provides two alternatives to the present much-criticized compliance system of exclusive relief from the Department of Labor") (600) (emphasis added); see also comments of Congressman Stenholm on HR 2216 (amendment would allow an "unprecedented private right of action") (602).

Although not all the proposed amendments were defeated on the merits, it is clear that Congress believed that Davis-Bacon and its Related Acts should be enforced administratively because of the expertise of the Department of Labor. See, e.g., Administration of the Davis-Bacon Act, General Subcommittee on Labor of the Committee on Education and Labor, 88th Cong. 1st Sess. (1963) (557) ("The Davis-Bacon and related acts involved over 46,000 project determinations a year with over a million individual wage determinations. With such a tremendous amount of determinations and with the need to proceed with

construction promptly, judicial review would not be appropriate to such a situation. The subcommittee found that the Davis-Bacon Act and its administration involves not merely an application of a set of legal provisions, but also very serious problems of industrial relations where actual experience in the local area many times influenced the way the law could be applied").

Under Suter, the adoption by Congress of the administrative enforcement scheme in Section 5310, supports a finding that Congress did not intend to create an enforceable right when it enacted Section 5310 but a "generalized duty" to be enforced by the Department of Labor.[7] See Suter, supra, 112 S.Ct. at 1368-1370 (although the statutory enforcement mechanisms there were not sufficiently comprehensive to demonstrate Congressional intent to preclude a § 1983 remedy, they did show that the absence of a § 1983 remedy did not make the provision in question "a dead letter" and that Congress

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[7] In addition to the administrative enforcement scheme specifically adopted in Section 5310, Section 5311 sets forth the enforcement powers of the Secretary of the Department of Housing and Urban Development ("HUD") for violations of Title I. Pursuant to the Department of Labor regulations, HUD, as the federal agency administering the funds, is required to monitor compliance with the wage standards provisions of Davis-Bacon Related Acts and to refer all violations and questions regarding Davis-Bacon standards and coverage to the Department of Labor. 29 C.F.R. §§ 5.6, 5.9, 5.12 (1974). Thus, even under HCDA, § 5311, Davis-Bacon questions should be referred to the Department of Labor before HUD takes enforcement action against the recipients of funds.

intended it to be enforced, not by private parties, but by the Secretary of Health and Human Services).[8]

Even under Wilder, respondents' Section 1983 claims must be dismissed because the administrative enforcement scheme is sufficiently comprehensive to demonstrate Congress' intent to preclude a Section 1983 remedy.

The determination whether a statutory enforcement scheme is sufficiently comprehensive does not turn on whether the scheme offers the benefitted parties complete relief or a judicial remedy. Rather, this Court in Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) and Smith v.

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[8] Justice Blackmun, in his dissenting opinion in Suter, which was joined by Justice Stevens, argued that:

> In our prior cases, the existence of other enforcement mechanisms has been relevant not to the question whether the statute at issue creates an enforceable right, but to whether the second exception to § 1983 enforcement applies – whether, that is, "'congress has foreclosed enforcement of the statute in the enactment itself.'" Wilder, 496 U.S., at 508, 110 S.Ct., at 2517 (quoting Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423, 107 S.Ct. 766, 770, 93 L.Ed. 2d 781 (1987)). In determining whether this second exception to § 1983 enforcement applies, we have required the defendant not merely to point to the existence of alternative means of enforcement, but to demonstrate "by express provision or other specific evidence from the statute itself that Congress intended to foreclose (§ 1983) enforcement." 496 U.S. at 520-521, 110 S.Ct. at 2523.

Robinson, 468 U.S. 972 (1984), focused on the elaborate and detailed nature of the enforcement schemes there and in the inconsistency which would be created if a Section 1983 remedy were permitted. Smith, 468 U.S. at 1011; Sea Clammers, 453 U.S. at 14-15, 20.

In Coutu, this Court recognized the elaborate nature of the administrative enforcement scheme set forth in the Davis-Bacon Act and the regulations promulgated pursuant to Reorganization Plan No. 14. The issue in Coutu was whether the Davis-Bacon Act conferred a "private right of action for back wages under a contract that administratively has been determined not to call for Davis-Bacon work." 450 U.S. at 767-768. This Court held that the Davis-Bacon Act did not confer such a private right of action.

This Court reasoned that "the implication of a private right of action where there has been no Davis-Bacon determination would introduce substantial uncertainty into government contracting" and would undercut "the elaborate administrative scheme." Further, the "uniformity fostered by those regulations would be short-lived if courts were free to make post-contract rulings." Id. at 783. This Court also recognized that the Davis-Bacon Act carefully balances the interests of contractors and their employees. Id. at 782. The administrative scheme is set up not only to afford employees relief, but to afford such relief when funds can be withheld and thus, be available to compensate employees. Further, the scheme was set up so that contractors would not be subjected to unexpected post-contract expenses.

Although this Court in Coutu did not reach the "broader question whether the federal courts have any jurisdiction to review agency [Department of Labor] coverage and classification determinations or to decide whether an implied right existed in a contract which did include Davis-Bacon stipulations," this Court noted that some of its reasoning "arguably applies to the question of whether the Act creates any implied right of action." 450 U.S. at 789, n.19.

This Court's reasoning in Coutu supports a determination that Congress intended that Section 5310 and other Davis-Bacon Related Acts be enforced by the Department of Labor. First, permitting a Section 1983 remedy will clearly undercut the administrative enforcement scheme since laborers will be permitted to by-pass the Department of Labor. Further, before an employee can recover back pay, a court must determine (1) whether the work performed was Davis-Bacon work and (2) the classification of this work. Not only are these matters better addressed to the expertise of the Department of Labor, allowing courts to make these determinations may lead to inconsistent results because Courts may differ with each other and the Department of Labor on issues of coverage and classification. Finally, allowing post-contract suits subjects contractors, as well as localities, to unexpected construction expenses at a time when monies may not be available to compensate the employees.

In sum, the Second Circuit's decision is completely contrary to Congress' intent that HCDA, § 5310 and all

Davis-Bacon Related Acts be enforced by the Department of Labor.

(2)

**The Second Circuit's reasoning gives laborers an unprecedented right of action under Section 1983 to enforce not only the Davis-Bacon wage provision of HCDA, Title I but also of several other Davis-Bacon Related Acts that contain identical or similar wage provisions.**

Under the Second Circuit's reasoning, several other Davis-Bacon Related Acts would also confer upon laborers a right enforceable under Section 1983. For example, the prevailing wage provision of the Elementary and Secondary Education Act, 20 U.S.C. § 1232b provides (emphasis added):

> Except for emergency relief under Section 241-1 of this title, all laborers and mechanics employed by contractors or subcontractors on all construction and minor remodeling projects assisted under any applicable program shall be paid wages at rates not less than those prevailing on similar construction and minor remodeling in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act.

In addition to the Elementary and Secondary Education Act, which applies to all grant programs administered by

the Secretary of Education, the relevant language of the following Davis-Bacon Related Acts are also identical to HCDA, § 5310: (1) Headstart, Opportunity and Community Partnership Act of 1974, 42 U.S.C. § 2992a; (2) Energy Conservation and Production Act, 42 U.S.C. 6881(h); (3) Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(a); (4) Domestic Volunteer Service Act of 1973, 42 U.S.C. § 5046; and (5) Emergency Community Facilities Act of 1970, 42 U.S. § 3107.

Additionally, other acts contain language specifically requiring the recipient of federal funds to provide, as a condition of funding, adequate assurance that prevailing wages will be paid. See, e.g., National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. § 954(n); Older Americans Act of 1965, 42 U.S.C. § 3027(a)(14)(D); Solid Waste Disposal Act, 42 U.S.C. § 6979; Hospital Survey and Construction Act, 42 U.S.C. § 291e(a)(5).[9]

Under the Second Circuit's reasoning, these other Davis-Bacon Acts would also create an enforceable right.

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[9] The relevant sections of the Davis-Bacon Related Acts cited above have been reprinted in the Appendix, at pages A112-120. There are numerous other Davis-Bacon Related Acts which contain wage provisions identical or similar to HCDA, Section 5310, but which are not included herein because they have since been either repealed or appropriations for the programs to be funded under the acts have ended. See, e.g., Commercial Fisheries Records and Development Act of 1964, 16 U.S.C. §779(e); Energy Security Act, 42 U.S.C. §8775.

For example, the Second Circuit, in determining that laborers were the intended beneficiaries of HCDA, § 5310, reasoned (A17):

> [w]hile the ultimate goal of Congress in enacting the HCDA was, as a whole, the development of viable urban communities by providing decent housing and expanding economic opportunities for persons of low and moderate income, there can be no question that the provisions for payment of a certain minimum wage confers its principal benefit on the wage earners.

Since the prevailing wage provisions of the other Davis-Bacon Related Acts also focus on the wage earners, the same conclusion can be drawn with respect to these other Acts notwithstanding the fact that Congress' overriding goal in enacting these statutes was not in any way related to the payment of prevailing wages.

Further, if Section 5310 imposes a binding obligation on the recipients of federal funds to pay prevailing wages because of the words "shall be paid" in that provision, then the other Davis-Bacon Related Acts discussed above would also impose such an obligation.

Finally, the Second Circuit found that Congress did not intend the statutory enforcement scheme specifically adopted in Section 5310 to be the exclusive enforcement mechanism for that provision. The Court reasoned that the statutory enforcement scheme, which included an

administrative enforcement mechanism before the Department of Labor, was not sufficiently comprehensive.

The Second Circuit's reasoning applies with equal force to the other Davis-Bacon Related Acts discussed above since they all (1) incorporate the Department of Labor enforcement mechanism and (2) do not provide a judicial remedy for laborers.

In sum, if the Second Circuit's decision is permitted to stand, laborers working on projects funded, not only by Title I, but also by several other Davis-Bacon Related Acts would be able to bring civil suits seeking back wages. As set forth above, however, Congress intended that Section 5310 and all other Davis-Bacon Related Acts be enforced by the Department of Labor. Thus, this case raises important issues of significance, not only to the parties herein, but also to many others.

(3)

**In determining that HCDA, § 5310 created an enforceable right, the Second Circuit failed to interpret that provision in the context of the rest of HCDA, Title I as required by Suter v. Artist M., ___ U.S. ___, 112 S.Ct. 1360, 1370 (1992). Further, the Second Circuit's decision conflicts in principle with Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 774 (1st Cir., 1986).**

In determining whether a federal statute creates an enforceable right, the Court should conduct a "[c]areful examination of the language relied upon by respondents, in the context of the entire Act." Suter, supra, 112 S. Ct. at 1370 (emphasis added). The Second Circuit, however, interpreted HCDA, § 5310 in isolation and not in the context of the rest of Title I.

When HCDA, § 5310 is read in the context of Title I, it is clear that respondents-laborers are not the intended beneficiaries of Title I. Rather, the intended beneficiaries are the communities and localities to whom Title I funds were to be distributed. Congress, in its declaration of purpose in enacting Title I, 42 U.S.C. § 5301(c), stated:

> The preliminary objective of this chapter is the development of viable urban communities, by providing decent housing

> and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives ...

Congress then enumerated nine specific objectives: (1) the elimination of slums and deterioration of property; (2) the elimination of unsafe conditions, through code enforcement and rehabilitation; (3) the conservation and expansion of housing stock; (4) the expansion and improvement of the quantity and quality of community services; (5) a more rational utilization of land; (6) the promotion of diversity and vitality of neighborhoods; (7) the restoration and preservation of properties of "special values for historic, architectural, or aesthetic reasons;" (8) the "stimulation of private investment and Community revitalization;" and (9) the conservation of scarce energy sources. 42 U.S.C. § 5301(c).

As demonstrated above, nothing in Congress's declaration of purpose even remotely supports a finding that laborers are the intended beneficiaries of Title I.

Further, the Second Circuit's holding conflicts in principle with Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 774 (1st Cir., 1986). There, the plaintiffs, minority residents of a City, claimed that the City discriminated

against them in connection with programs funded under Title I. They argued that the anti-discrimination clause of Title I, Section 5309(a), created a private right of action. The First Circuit held that although Section 5309(a) focused on a class of individuals to be protected, that provision could not "be viewed in isolation and must be considered as part of the context in which it appears." 799 F.2d at 793. The First Circuit noted that Congress' primary purpose in enacting Title I was not to prevent discrimination but was to foster "'the development of viable urban communities'" (quoting 42 U.S.C. § 5301(c)). Id. The First Circuit thus concluded that the enactment of Section 5309(a) "reflects generally the requirement that federal fund recipients not discriminate, rather than an intent to benefit a special class." Id. at 794.

Petitioners recognize that the Davis-Bacon Act itself is a law "designed for the benefit" of workers. See, United States v. Binghamton Construction Co., 347 U.S. 171, 178 (1954). However, unlike the Davis-Bacon Act, which is purely a labor standards statute, Section 5310 is only one provision of Title I. The Second Circuit erroneously read Section 5310 in isolation when it determined that laborers were its intended beneficiaries.

Additionally, Congress' use of the words "shall be paid" in Section 5310 is not dispositive of the issue of whether Congress intended to impose a binding obligation on recipients to pay prevailing wages. Congress' purpose in enacting Title I was not to ensure the payment of prevailing wages but to streamline the means by which federal funds were distributed so that localities would have

greater flexibility in designing and implementing community programs. Section 5310 is not an integral part of Title I. Compare, Wilder (the provision in question there, which did impose a binding obligation on recipients of funds, was an integral part of the Medicaid program and its statutory and regulatory scheme).

(4)

**Lower Courts need guidance as to the proper framework to apply in determining whether a federal statute creates a right enforceable under Section 1983.**

Several circuits and district courts have questioned the viability of the Wilder analysis in light of Suter because (1) this Court in Suter did not apply the Wilder analysis and (2) Justice Blackmun, in his dissenting opinion joined by Justice Stevens, argued that the Suter majority had abandoned the Wilder framework. 112 S.Ct. at 1371. See, e.g., Resident Council of Allen Parkway Village v. United States Department of Housing and Urban Development, 980 F.2d 1043, 1051 (5th Cir., 1993), petition for cert. pending, 92-1905 (filed May 27, 1993); Stowell v. Ives, 976 F.2d 65, 68 (1st Cir., 1992); Clifton v. Schafer, 969 F.2d 278 (7th Cir., 1992); Evelyn v. Kings County Hospital Center, 819 F. Supp. 183, 190 (E.D.N.Y., 1993); Lampkin v. District of Columbia, _F. Supp. __, 60 U.S.L.W. 2807 (D.D.C., 1992); Board of Education v. Leininger, 822 F. Supp. 516, 529 (N.D. Ill., 1993).

Faced with this uncertainty as to the proper framework to apply, courts, such as the Second Circuit in this case, have applied the Wilder analysis with some modifications suggested by Suter. See, e.g., Stowell v. Ives, supra, 976 F.2d at 68; Clifton v. Schafer, 969 F.2d 278 (7th Cir., 1992); see also, Arkansas Medical Society, Inc. v. Reynolds, _ F.3d__, 1993 W.L. 341165 (8th Cir., 1993); Resident Council of Allen Parkway Villages, supra, 980 F.2d at 1052. However, Wilder and Suter are not completely reconcilable. For example, under Suter, the existence of a statutory enforcement scheme is relevant when determining whether Congress intended to create an enforceable right. Under Wilder, however, the statutory enforcement scheme is only relevant to Congress' intent to preclude a Section 1983 remedy. In this case, the Second Circuit reconciled the two approaches by simply not including the statutory enforcement scheme in its analysis as to whether HCDA, § 5310 created an enforceable right. Thus, this Court should give guidance to the lower courts as to the proper framework to apply in determining whether a federal statute creates an enforceable right.

(5)

**The Second Circuit has expanded the state action doctrine and has imposed on all state governing entities an obligation to ensure that government contracts, on their face, are sufficiently funded to permit the contractor to pay Davis-Bacon wages, where applicable.**

The Second Circuit found state action in this case based on the allegations that (1) the per worker per day funding cap placed in the contracts by the City did not provide CPC with sufficient funds to pay prevailing wages and (2) CPC was prohibited from receiving funds from other sources to fulfill its obligations under the contract. The Second Circuit thus found that the City "'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [city].'" (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 547 (1987)) (A22-23).

In so doing, the Second Circuit failed to recognize that (1) the contracts specifically provided that CPC had to comply with all federal laws, including the payment of prevailing wages, where applicable (89, 129, 337, 382, 939, 939fff); (2) CPC was responsible for determining whether it could comply with the contracts before entering into the contracts; and (3) if the contracts proved not to be sufficiently financed, CPC, a non-profit organization, was still free to cover some of its costs out of its own pocket or operating budget.

The Second Circuit has placed an affirmative obligation on state governing entities to ensure that every bid proposal is sufficiently financed to cover all applicable federal laws which may confer enforceable rights under 42 U.S.C. § 1983. Such an extension of the state action doctrine is without precedent. See, Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (private entities do not become state actors simply because they contract with the government); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[m]ere approval of or acquiescence" by state of private party action not state action even if activity is "extensively regulated" by state).

## CONCLUSION

## THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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No. 93-

Supreme Court, U.S.
FILED
OCT - 4 1993
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF NEW YORK; DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY; CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Petitioners,

- against -

KAM SHING CHAN, et al.,

Respondents.

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 1230, 1231, 2194—August Term, 1992

(Argued: March 8, 1993 Decided: July 26, 1993)

Docket Nos. 92-9236, -9238, 93-7038

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KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI XIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TIAN GUANG MAI, CHEUK MINK NG, KIN CHUNG NG, KIN HIN NG, SHUN GAO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN and YUE NAM ZHU,

*Plaintiffs-Appellees-Cross-Appellants,*

—v.—

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY and CHINESE-AMERICAN PLANNING COUNCIL, INC.,

*Defendants-Appellants-Cross-Appellees.*

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B e f o r e :

KEARSE and CARDAMONE, *Circuit Judges*, and BURNS, *District Judge**.

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Appeal from order of the United States District Court for the Southern District of New York, Robert J. Ward, *Judge*, denying motion to dismiss portion of complaint for failure to state a claim under 42 U.S.C. § 1983; cross-appeal from judgment dismissing portion of complaint for failure to state a claim under 42 U.S.C. § 5310. *See* 803 F. Supp. 710 (1992).

Affirmed.

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JAMES REIF, New York, New York (Ellen Dichner, Gladstein, Reif & Meginniss, Shneyer & Shen, Asian American Legal Defense & Education Fund, New York, New York, on the brief), *for Plaintiffs-Appellees-Cross-Appellants*.

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* Honorable Ellen Bree Burns, of the United States District Court for the District of Connecticut, sitting by designation.

PETER A. WALKER, New York, New York (Jay W. Waks, Brian G. Cesaratto, Kaye, Scholer, Fierman, Hays & Handler, New York, New York, on the brief), *for Defendant-Appellant Chinese-American Planning Council, Inc.*

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KEARSE, *Circuit Judge*:

Defendants City of New York ("City"), Department of Housing Preservation & Development of New York City ("HPD") (collectively "municipal defendants"), and the Chinese-American Planning Council, Inc. ("CPC"), appeal from so much of an order of the United States District Court for the Southern District of New York, Robert J. Ward, *Judge*, as denied their motions pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss claims of plaintiffs Kam Shing Chan *et al.*, asserted under 42 U.S.C. § 1983 (1988) for payment of subminimum wages, in violation of § 5310 of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* (1988 & Supp. II 1990) ("HCDA" or the "Act"). The district court ruled that although there is no private right of action directly under § 5310, plaintiffs' claims for violation of that section could be pursued under § 1983. On appeal, defendants contend principally (a) that § 5310 does not create a right that can be enforced under § 1983, and (b) that a § 1983 action cannot be maintained because CPC cannot be considered a state actor. Plaintiffs cross-appeal, challenging the district court's ruling that § 5310 affords them no private right of action directly under that section. For the reasons below, we reject these challenges and affirm in all respects.

## I. BACKGROUND

Plaintiffs were employees of CPC who worked on federally funded construction projects. The present controversy arises out of their claims that CPC paid them less than the minimum wage rates federally required for such projects. For purposes of both the appeal and the cross-appeal, we accept as true the allegations of the First Amended Verified Complaint ("Complaint"), as clarified by the actual terms of the contracts invoked by the Complaint and presented to the district court, *see Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1561 (1992).

### A. *The Contracts Between CPC and HPD*

From 1986 to 1989, CPC was party to a series of three contracts with HPD for the construction, repair, and rehabilitation of certain housing owned by the City (collectively the "Contracts"). The Contracts were funded in whole or in part by federal grants under the HCDA. Section 5310 of that Act provides generally that laborers employed on construction work financed in whole or in part by HCDA grants "shall be paid wages at rates not less than those prevailing on similar construction in the locality" as determined by the Secretary of Labor (hereinafter "federally recognized prevailing rates") in accordance with the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1988) ("Davis-Bacon"). *See* 42 U.S.C. § 5310.

The Contracts between CPC and HPD contained certain terms and conditions required by the HCDA. One such provision, entitled "Federal Supplemental Terms and Conditions," stated that

> [t]he Contractor acknowledges that this Agreement is funded under a program providing direct financial assistance from the Federal government to the City and HPD and is subject to, and the Contractor shall comply with, the requirements of all applicable Federal Statutes, rules and regulations, including, but not limited to, those set forth in Exhibit F attached to this Agreement.

(1986–87 Contract, Article 18, ¶ 18.1.) Exhibit F specified that the Contracts were subject to the conditions of, *inter alia*, the HCDA and Davis-Bacon:

> The Davis-Bacon Act: In construction contracts involving an excess of $2000, unless exclusively in connection with the rehabilitation of a structure designed for residential use by less than 8 families, all laborers and mechanics must be payed at a rate not less than those determined by the Secretary of Labor to be prevailing for the locality, which rates are annexed hereto as Exhibit A. These wage rates are a federally mandated ***minimum*** . . . .

(1986–87 Contract, Exhibit F, Article 3(b)(i) (emphasis in original).)

Each Contract was awarded following the submission of bids in response to HPD's Requests for Proposals ("RFPs"). The RFPs, which were incorporated in the Contracts, contained express provisions with respect to the wages to be paid workers on projects covered by the Contracts. For example, the RFP for the 1986–87 Contract stated:

> A Person-Day Rate, which shall be all inclusive of costs within each Proposal, will be the proper method of establishing the overall budget. For example, if

> $75.00 is the Person-Day Rate, all costs to run the program, pay the staff and trainees and provide training equipment and administrative services would be covered by said rate multiplied by the number of trainees multiplied by the number of days worked.

(1986–87 RFP General Guidelines ¶ 1 (emphasis omitted).) This RFP also provided that "[t]here shall be 246 work days in the term of the Contract" (*id.* ¶ 6 (emphasis omitted)), and that "[a] maximum Person-Day Rate is being set at $90.00" (*id.* ¶ 2). The Contract prohibited CPC from receiving any additional funding for "Program Work performed pursuant to this Agreement." (1986–87 Contract, Article 15, ¶ 15.2.)

CPC bid for and won the 1986–87 Contract with a budget that called for 30 trainees working 246 days at the $90 Person-Day Rate. The total contract price was thus $664,200. The 1988 and 1989 Contracts awarded to CPC were similar, though the RFPs permitted, and the Contracts called for, Person-Day Rates of $95.

B. *The Present Lawsuit and the District Court's Decision*

In 1990, plaintiffs commenced the present action, alleging that they were CPC employees who had performed construction, repair, or rehabilitation work on the projects covered by these Contracts and that from September 1986 to December 1989, (1) the wage rates specified in the Contracts were lower than the then-current federally recognized prevailing rates, and (2) CPC paid plaintiffs at rates even lower than those specified in the Contracts. The Complaint alleged that HPD "knowingly consented to, condoned, authorized, acquiesced in, and acted with deliberate indifference to, the repeated failures and refusals of CPC to pay plaintiffs at the federally mandated

prevailing wage rates." (Complaint ¶ 53.) Plaintiffs contended principally that CPC in failing to pay federally recognized prevailing rates, and HPD in consenting, condoning, and authorizing that failure, deprived plaintiffs of their rights under § 5310, in violation of § 1983. As damages, plaintiffs requested, *inter alia*, the difference between the federally mandated wages and the wages they actually received.

Defendants moved pursuant to, *inter alia*, Fed. R. Civ. P. 12(b)(6) to dismiss plaintiffs' federal claims on the grounds that (1) no implied private right of action exists under § 5310, (2) the HCDA did not create a right that is enforceable under § 1983, and (3) in any event, the Complaint did not sufficiently allege that CPC acted under color of state law within the meaning of § 1983. In an opinion reported at 803 F. Supp. 710 (1992), the district court dismissed plaintiffs' claims to the extent that they were asserted directly under § 5310 but denied defendants' motions to dismiss to the extent that the claims were asserted under § 1983.

In determining that § 5310 itself did not grant plaintiffs a private right of action, the district court principally applied the analysis set out in *Cort v. Ash*, 422 U.S. 66 (1975). Noting that Congress had created other tools for the enforcement of § 5310 and that there was "no strong indication that Congress intended to create additional remedies," the court concluded that no private right of action is to be implied under § 5310. 803 F. Supp. at 731.

The court ruled, however, that § 5310 created a federal right that is enforceable under § 1983. Reading § 5310 literally and finding that its wording reflected an "unambiguous focus on construction workers," 803 F. Supp. at 723, the court concluded that there was "little doubt that

§ 5310 [wa]s intended to provide laborers with higher wages than they would receive in the absence of this section," 803 F. Supp. at 723, and that by using the command " '*shall*' " in requiring payment of wages at rates not less than the federally recognized prevailing rates, *id.* (emphasis in opinion), Congress indicated its intent to create a binding obligation, *id.* at 725. Given that the Secretary of Labor is required to establish with specificity the minimum rates to be paid laborers and mechanics, the court concluded that plaintiffs' interests were not vague, ambiguous, or amorphous:

> The contractor knows exactly what wage rates will need to be paid and . . . [what] rights are unambiguously conferred on laborers and mechanics. Finally, because the "shall" requirement of § 5310 is directed at the payment of workers' wages, rather than compelling the inclusion of a contract provision . . . the requirement is substantive, not procedural.

*Id.*

The court found "no evidence in the legislative history of the HCDA itself that Congress sought to foreclose a § 1983 remedy under § 5310." 803 F. Supp. at 729. It noted that the administrative scheme established for enforcement of § 5310, though sufficient to contraindicate a private right of action directly under that section, was not sufficiently comprehensive to preclude a § 1983 right of action, since there was no provision in the statute for judicial remedies and no provision in the federal regulations for an employee to initiate a proceeding for resolution of disputes. 803 F. Supp. at 727–28.

The court also concluded that the Complaint sufficiently alleged the state action necessary for a § 1983 suit

because there was a close nexus between CPC and the municipal defendants:

> Under the close nexus test and the facts presently before the Court, . . . CPC can be said to be a state actor. On the basis of the CPC/HPD Contracts and the RFPs, plaintiffs have alleged facts which, if proven true, would demonstrate that municipal defendants had "exercised coercive power or ha[d] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 546, 107 S. Ct. at 2986 (citations omitted). In particular, plaintiffs assert that the $90–95 cap on the Person Day Rate, which was required by municipal defendants as a condition for awarding the contract, was so low as to make it financially impossible for CPC to pay prevailing wage rates as required under 42 U.S.C. § 5310. In short, plaintiffs have alleged facts asserting that the municipal defendants ensured that any successful bidder would be forced, for economic reasons, to violate 42 U.S.C. § 5310. If proven true, these facts would be sufficient to demonstrate that the municipal defendants "exercised coercive power or . . . provided such significant encouragement" as to establish 42 U.S.C. § 1983 state action under the close nexus test.

803 F. Supp. at 720–21.

Accordingly, the district court denied defendants' motions to dismiss to the extent that the Complaint asserted claims under § 1983.

Pursuant to 28 U.S.C. § 1292(b) (1988), the court certified for interlocutory appeal so much of its order as

denied defendants' motions to dismiss the § 1983 claims, and this Court granted defendants permission to appeal from that portion of the district court's order. Thereafter, pursuant to Fed. R. Civ. P. 54(b), the district court directed that a final judgment be entered with respect to so much of its order as had granted defendants' motions to dismiss plaintiffs' claims directly under § 5310, finding that there was no just reason for delay and that the relationship between those claims and the § 1983 claims was sufficiently close to make it desirable for this Court to have the opportunity to review both rulings together. Plaintiffs' cross-appeal followed and was consolidated with defendants' appeal.

## II. DISCUSSION

The HCDA, enacted in 1974, provides for federal grants to local governmental units for use in the "development of viable urban communities," in part "by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income," 42 U.S.C. § 5301(c). Section 5310, which requires that certain workers employed on construction projects funded by the HCDA be paid at least at federally recognized prevailing wage rates, provides in pertinent part as follows:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a–276a-5) . . . .

> The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 . . . .

42 U.S.C. § 5310(a). The Reorganization Plan referred to (hereinafter "1950 Plan") required federal agencies to cooperate in the enforcement of federal labor standards. Reorganization Plan No. 14 of 1950, 5 U.S.C. app. (1988).

The questions presented by these appeals are (1) whether an action for violation of § 5310 is available to plaintiffs directly under that section; (2) whether an action for violation of § 5310 is available to plaintiffs under § 1983; and (3) if such an action is available under § 1983, whether payment of subminimum wages by CPC can meet § 1983's requirement of state action. We conclude, substantially for the reasons stated by the district court, that the first question should be answered in the negative but that the second and third should be answered in the affirmative.

A. *Implied Private Right of Action Under § 5310*

Whether an implied private right of action exists under a federal statute is strictly a matter of congressional intent. "'[U]nless th[e] congressional intent [to create such a right] can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981)); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (court's "task is limited solely to determining

whether Congress intended to create the private right of action asserted"). "The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 509 n.9 (1990) ("*Wilder*").

When the statute itself is silent as to whether it may be enforced by private action, we normally start by examining the four factors set forth in *Cort v. Ash*, 422 U.S. 66, to wit, (1) whether the plaintiff is one of the class for whose "'*especial*'" benefit the statute was enacted, "that is, does the statute create a federal right in favor of the plaintiff"; (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff"; and (4) whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78 (emphasis in original). All four *Cort v. Ash* factors are guides to determining congressional intent. *See Wilder*, 496 U.S. at 508 n.9; *Thompson v. Thompson*, 484 U.S. at 179; *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15-16 (1979); *Health Care Plan, Inc. v. Aetna Life Insurance Co.*, 966 F.2d 738, 740 (2d Cir. 1992). The mere fact that plaintiffs are intended beneficiaries of the statute does not mean that Congress intended the statute to grant them a private right of action to secure that benefit. *See, e.g., id.* at 741. The courts may, for example, infer that Congress did not intend to create such a right of action if it expressly provided other remedies:

> [W]here a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. . . . In such cases, "[i]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."

*Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 533 (1989) (quoting *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981)).

Here, though we are persuaded that plaintiffs, as workers on an HCDA-funded project, are a class for whose special benefit § 5310 was enacted (see Part II.B.1. below), neither the statute nor the legislative history gives any indication that Congress intended that section to create a private right of action. Further, though the question is close, we tend to agree with the district court that Congress incorporated a regulatory scheme that is sufficiently detailed to suggest that no private right of action was intended. Under the 1950 Plan, to which Congress referred in § 5310, the Secretary had adopted regulations with respect to Davis-Bacon and related statutes; the regulations included provisions for the predetermination of prevailing wage rates, *see* 29 C.F.R. § 1.1 *et seq.* (1974); for reconsideration or administrative review of a wage determination at the request of "[a]ny interested person," *see id.* §§ 1.8, 1.9; for investigations of complaints, *see id.* § 5.6; and for the resolution by a hearing officer of disputes of fact or law concerning proper classifications and the payment of prevailing wage rates, *see id.* § 5.11.

By its reference to the 1950 Plan in § 5310, Congress indicated that that section could be enforced through these regulatory provisions. Though there was no statement that

these would be the exclusive means of enforcement, there simply was no indication that, along with the cited regulatory mechanism, Congress also intended to authorize laborers to bring private suits. Accordingly, we conclude that § 5310 does not contain an implied private right of action.

B. *Enforceability of § 5310 Under § 1983*

The fact that a statute conferring substantive rights does not itself give its beneficiaries a private right of action to enforce it does not mean that the beneficiaries are without a private remedy. Section 1983, which provides, in pertinent part, that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured,

42 U.S.C. § 1983, may be available as a vehicle for remedying violations of federal statutes as well as constitutional violations, *see Maine v. Thiboutot*, 448 U.S. 1 (1980); *Suter v. Artist M.*, 112 S. Ct. 1360, 1366 (1992) ("*Suter*"). And unlike the inquiry into whether a substantive statute confers a direct private right of action, the § 1983 inquiry begins with a presumption in favor of the right to bring suit, for the "general rule" is that § 1983 provides a remedy for violations of federal statutory rights unless "Congress has affirmatively withdrawn the remedy," *Wilder*, 496 U.S. at 509 n.9.

Nonetheless, though the Supreme Court has "repeatedly held that the coverage of [§ 1983] must be broadly con-

strued," *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989), not every violation of a federal statute gives rise to a cause of action under § 1983. Section 1983 relief "is not available to enforce a violation of a federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.'" *Suter*, 112 S. Ct. at 1366 (quoting *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 423 (1987)); *see also Wilder*, 496 U.S. at 508. As discussed below, neither circumstance exists here to prevent these plaintiffs from suing under § 1983 for the alleged violations of § 5310.

1. *Creation of an Enforceable Right*

In *Wilder*, the Supreme Court applied a three-part analysis, which is different from the *Cort v. Ash* analysis of the existence of a direct right of action, *see Wilder*, 496 U.S. at 508-09 n.9, for determining whether a federal statute creates a right that may be enforced under § 1983. The § 1983 inquiry

> turns on whether "the provision in question was intend[ed] to benefit the putative plaintiff." . . . If so, the provision creates an enforceable right unless it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit . . . or unless the interest the plaintiff asserts is "'too vague and amorphous'" such that it is "'beyond the competence of the judiciary to enforce.'"

*Wilder*, 496 U.S. at 509; *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. at 106.

The *Wilder* Court considered whether health-care providers could maintain a § 1983 action to enforce a provision of the Medicaid Act that required a state, in order to receive reimbursement, to submit to the Secretary of Health and Human Services ("HHS") a medical assistance plan that set rates which the "'State finds, and makes assurances satisfactory to [HHS] are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities,'" *Wilder*, 496 U.S. at 503 (quoting 42 U.S.C. § 1396a(a)(13)(A) (Supp. V 1982)). The Court found that there was "little doubt that health care providers are the intended beneficiaries" of that provision, *Wilder*, 496 U.S. at 510; that the provision imposed a binding obligation on participating states that was "cast in mandatory rather than precatory terms," *id.* at 512; and that the obligation was not "too 'vague and amorphous,'" as "the statute and regulation set out factors which a State must consider" and provided objective benchmarks for the assessment of the reasonableness of the rates, *id.* at 519. Thus, the Court concluded that the statutory provision created a right that health-care providers could enforce in an action under § 1983.

Two years later, the Supreme Court in *Suter* distinguished *Wilder*, without mentioning its three-part test, in reaching a contrary conclusion as to a different statutory provision. The *Suter* Court considered whether children who were state wards could, under § 1983, enforce a federal statutory provision that conditioned federal reimbursement for state foster care programs on the acceptance by HHS of a state plan containing a provision that " 'reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B)

to make it possible for the child to return to his home . . . .' " 112 S. Ct. at 1364 (quoting 42 U.S.C. § 671(a)(15)). The *Suter* Court concluded that the children had no right to maintain a § 1983 action because (a) there was insufficient statutory guidance as to how "reasonable efforts" were to be measured; (b) the state's mode of compliance was, "within broad limits, left up to the State," 112 S. Ct. at 1368; and (c) since the statute provided other enforcement mechanisms, the absence of a private remedy under § 1983 did not make the "reasonable efforts" clause ineffectual, 112 S. Ct. at 1368-69. The Court reasoned that "[t]he term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by [HHS]," and thus did not "unambiguously confer an enforceable right upon the Act's beneficiaries." *Id.* at 1370.

In the present case, we conclude that under either the *Wilder* analysis or, to the extent that it differs, the *Suter* analysis, § 5310 provides these plaintiffs with a right that is sufficiently clear to be enforceable under § 1983. While the ultimate goal of Congress in enacting the HCDA was, as a whole, the development of viable urban communities by providing decent housing and expanding economic opportunities for persons of low and moderate income, there can be no question that the provision for payment of a certain minimum wage confers its principal benefit on the wage earners. The persons whose wages are the subject of § 5310 are clearly specified: they are "laborers and mechanics." The statutory requirement as to their wages is not merely a hortatory "reasonable efforts" provision; nor is it merely a provision requiring inclusion of wage terms in a state plan; rather, the statute states that at least the required level of wages "shall be paid." Further, the

minimum level of those wages is neither vague nor speculative nor left for determination by the states; rather, it is determinable by reference to an unambiguous specified standard set by a federal official—the Secretary of Labor—in accordance with another federal statute—Davis-Bacon.

In sum, there can be little doubt that laborers and mechanics are the intended beneficiaries of an obligation that is cast by § 5310 in mandatory terms and that is readily quantifiable by reference to a stated benchmark as set by a federal official. There is no ambiguity. The contractor is required to pay such workers wages at rates not lower than the federally recognized prevailing rates.

2. *Congressional Foreclosure*

Notwithstanding a clearly conferred federal right, a § 1983 suit would not be available if Congress had manifested its intention to foreclose such a remedy. *Suter*, 112 S. Ct. at 1366. The courts should " ' "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy" for the deprivation of a federally secured right.' . . . The burden is on the State to show 'by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement,' " *Wilder*, 496 U.S. at 520-21 (citations omitted). Such "other specific evidence" may include provision of a scheme of remedial devices that is sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under § 1983. *See, e.g., Wilder*, 496 U.S. at 521; *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) ("*Sea Clammers*"). In *Sea Clammers*, for example, the Court dealt with claims under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and the Marine

Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq*. The statutes themselves contained "unusually elaborate enforcement provisions," 453 U.S. at 13, including, for example, provisions in the water pollution statute (a) authorizing the Environmental Protection Agency Administrator to seek civil penalties of up to $10,000 a day, as well as criminal penalties, (b) allowing "any interested person" to seek review of agency actions in federal courts, and (c) allowing citizens to sue for injunctions or for civil penalties payable to the government, 453 U.S. at 13-14 & n.25. The *Sea Clammers* Court concluded that because Congress "created so many specific statutory remedies, including the . . . citizen-suit provisions," it "intended to supplant any remedy that otherwise would be available under § 1983." 453 U.S. at 20-21. *See also Smith v. Robinson*, 468 U.S. 992, 1003 (1984) ("when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme should not be supplanted by the remedial apparatus of § 1983").

The statutory scheme provided by § 5310 is not so comprehensive. The HCDA itself, though it allows the Secretary of Labor to ask the Attorney General to bring a civil action against a grant recipient for noncompliance with the Act, *see* 42 U.S.C. §§ 5311(b); 5309(b)-(c), makes no reference to any other type of civil suit. As discussed in Part II.A. above, § 5310 authorizes the Secretary of Labor to cooperate with other federal agencies in enforcement and in effect adopts the regulatory scheme fashioned by the Secretary. Even that scheme, however, though providing for the determination of prevailing wage rates, the investigation of complaints, and the resolution of wage disputes, does not make provision for laborers to enforce their rights administratively. The dispute-resolution proceedings may be initiated only by the federal

agency administering the HCDA contract, the Secretary, or an HCDA contractor or subcontractor. *See* 29 C.F.R. § 5.11(a) (1992). Indeed, at the time the HCDA was enacted, the regulations apparently permitted only the contract-administering agency to initiate such proceedings. *See* 29 C.F.R. § 5.11(b) (1974). The laborers who are the beneficiaries of § 5310 were not and are not allowed to initiate administrative dispute-resolution proceedings. Nor is there any provision for a laborer to obtain judicial review of any administrative decision. In sum, we do not see in § 5310 recognition of a regulatory scheme of such comprehensiveness as to manifest an affirmative congressional intent to preclude invocation of § 1983 as a remedy.

In arguing that Congress intended to preclude use of § 1983 actions to enforce § 5310, defendants rely heavily on *Universities Research Assn. v. Coutu*, 450 U.S. 754 (1981) ("*Coutu*"), which held that there was no private right of action under Davis-Bacon for back wages where (a) the contract did not provide for Davis-Bacon wage levels, and (b) there had been an administrative predetermination that the contract did not call for Davis-Bacon work. The *Coutu* Court noted that a contractor needs to know in advance what its labor costs will be and reasoned that implication of a private right of action under Davis-Bacon to sue on a contract that had been predetermined not to call for Davis-Bacon wages would "destroy [the] careful balance" created between contractors and employees. 450 U.S. at 782.

For several reasons, this ruling does not suggest foreclosure of the § 1983 claims asserted here. First, the conclusion that a direct action may not be brought to enforce Davis-Bacon rights where it had been administratively predetermined that Davis-Bacon did not apply would not

be persuasive authority for even the proposition that no *direct* action may be brought to enforce a contract that expressly requires the payment of wages at Davis-Bacon levels. Indeed, the *Coutu* Court expressly "d[id] not decide whether the [Davis-Bacon] Act creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations." 450 U.S. at 769. Second, *Coutu*'s concern for the contractor's need to know in advance its labor costs is not an issue here, since the Contracts expressly required the payment of wages at Davis-Bacon levels. Finally, and most importantly, *Coutu* concerned only whether the action could be brought directly under Davis-Bacon, not whether it could be brought under § 1983. Though there can be no implied direct private right of action unless Congress demonstrably intended to create one, the § 1983 remedy is presumptively available unless Congress has affirmatively withdrawn it. As indicated above, we have seen no indication that Congress meant to withdraw the § 1983 remedy for violation of § 5310 where the contracts expressly call for payment of wages at rates not lower than the federally recognized prevailing rates.

In sum, we conclude that § 1983 is available as a remedy for state action that violated § 5310.

C. *State Action*

An action under § 1983 cannot, of course, be maintained unless the challenged conduct was attributable at least in part to a person acting under color of state law. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 835 (1982); *Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir. 1993). Thus, plaintiffs must plead and prove that the relationship between CPC, which paid their wages, and the municipal defendants, which established limitations

on the wages that could be paid, was sufficient to permit an inference that CPC acted not as an independent organization, but an arm of the state.

Actions by a private party are deemed state action if "there is a sufficiently close nexus between the State and the challenged action" that the actions by the private parties "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *see Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1081 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1583 (1991). The "close nexus" test is not satisfied merely by the fact that the private entity is a business " 'affected with the public interest,' " *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353; or that the state "'approv[ed] of or acquiesce[d] in the initiatives' " of the private entity, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 547 (1987) ("*San Francisco*") (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)); or that a business is subject to extensive regulation, *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 350, was publicly subsidized, *San Francisco*, 483 U.S. at 544, or had been given monopoly status by the state, *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 351-52. "Acts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. at 841. "The purpose of [the close-nexus] requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. at 1004 (emphasis in original). Such responsibility may be found when, after the facts are sifted and weighed, it is evident that a state or its political subdivision "'has exercised

coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [state or political subdivision].'" *San Francisco*, 483 U.S. at 546 (quoting *Blum v. Yaretsky*, 457 U.S. at 1004).

The present Complaint meets the close-nexus test because the facts alleged, and supported by the Contracts relied on, easily permit the inference that CPC could not pay wages at the level required by § 5310 because of strictures imposed by the municipal defendants. The HPD RFPs provided that the contractor's overall budget was to be determined by setting a "Person-Day Rate," multiplied by the number of trainees, multiplied by the number of days worked. The Person-Day Rate was to include wages paid to the worker and all other expenses of running the program, and HPD placed a dollar ceiling on the Person-Day Rate. For the 1986–87 Contract, that ceiling was $90; for the other years, the ceiling was $95. Both ceilings were below the federally recognized prevailing wage minima for a full day's work. Thus, to win the Contracts, CPC was required to make its bids based on wages below those levels; it was paid a sum that did not give it sufficient funds to pay wages at the § 5310 required minimum levels; and it was prohibited by the Contracts from receiving any additional funding for the work performed thereunder.

In sum, the facts alleged would suffice to permit a finding that HPD effectively required CPC to pay less than the minimum wages required by § 5310, that the actions of CPC in paying those subminimum wages were the responsibility of the municipal defendants, and that CPC's conduct was therefore state action.

Defendants also contend that even if CPC's wage payments were constrained by the municipal defendants, CPC

could not be deemed a state actor because the municipal defendants themselves were engaged only in federal, not state, action, as they merely expended federal funds under the HCDA. We reject this contention for the principal reason that the "Person-Day Rate" set by the RFPs, along with the provision that the contractor could not obtain other funding to pay its workers, apparently represented an attempt by the City to limit any call upon its own treasury for the projects in question. These restrictions were not required by any federal provision. Thus, the underpayment of wages cannot be attributed to the federal government; and the municipal defendants in limiting the wages that could be paid and CPC in paying the wages as thus limited cannot legitimately claim to have been federal, rather than state, actors.

We conclude that the district court properly denied defendants' motions to dismiss plaintiffs' § 1983 claims.

## CONCLUSION

The order and judgment of the district court are affirmed. Costs to plaintiffs.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT GRANTING PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b) ENTERED NOVEMBER 10, 1992
Docket Nos. 92-9236, 92-9237

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KAM SHING CHAN, et. al.,

- v -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and THE CHINESE-AMERICAN PLANNING COUNCIL INC.

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Before: Hon. Jon O. Newman, Hon. Richard J. Cardamone and Hon. J. Daniel Mahoney, CJJ

**IT IS HEREBY ORDERED** that the motion be and it hereby is granted.

ELAINE B. GOLDSMITH, Clerk
By:

Edward J. Guardaro,
Staff Attorney

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK 90 Civ. 5653 (RJW), DATED JUNE 5, 1992

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KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI XIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GUO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YUE NAM ZHU,

Plaintiff,

- against -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNSEL, INC.,

Defendants.

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**OPINION**

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WARD, District Judge.

Chinese-American Planning Counsel,Inc. ("CPC") has moved to dismiss plaintiffs' First Amended Verified Complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which relief can be granted. The City of New York ("the City") and the Department of Housing Preservation and Development of the City of New York ("HPD") (collectively "the municipal defendants") have moved to dismiss the First Amended Complaint pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of jurisdiction over the subject matter and/or Rule

12(b)(6), Fed. R. Civ. P., for failure to state a claim which relief can be granted.[1]

By order dated July 26, 1991, the motions were referred to the Honorable James C. Francis IV, United State Magistrate Judge, to hear and report pursuant to 28 U.S.C. § 636(b)(1)(B). On January 6, 1992, Magistrate Judge Francis filed a Report and Recommendation ("the Report"), in which he recommended that the motions to dismiss be granted in their entirety. Plaintiff timely filed objections to the Report. For the reasons that follow, the Court denies defendants' motions in part, grants them in part, and modified the magistrate

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[1] At the pre-motion conference on November 30, 1990, the Court gave defendants leave to file motions to dismiss only plaintiffs' federal claims. The Court indicated that it would consider whether to permit motions to dismiss plaintiffs' state claims after deciding the instant motions.

judge's findings and recommendations in accordance with this option.[2]

## BACKGROUND

Kam Shing Chan and the other plaintiffs seek to recover back wages, which they claim are due them under 42 U.S.C. § 5310 and applicable contracts, from CPC

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[2] In their submissions to the Court, the parties make several references to Charles Dickens' A Tale of Two Cities. According to a recent article, this novel was the eighth most commonly assigned book in public high schools in 1963, when it was assigned to 33% of all students. Shakespeare Then, Shakespeare Now: What They Read in High School, N.Y. Times, May 29, 1992, at B8. By 1988, however, this classic of English literature had fallen off the top ten list. Perhaps a more timely literary reference would be to Harper Lee's To Kill a Mockingbird (number four on the list in 1988, assigned to 74% of public high school students). Defendants' instant motions are undoubtedly an effort "to kill a complaint".

and the municipal defendants.[3] Plaintiffs also seek liquidated damages and attorneys' fees.

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[3] In their complaint, plaintiffs assert that they were subjected to deprivations of their rights secured by 42 U.S.C. § 5310, in violation of 42 U.S.C § 1983. First Amended Verified Complaint ¶¶ 56-61. Nowhere in the complaint do plaintiffs explicitly allege that they have an impled private right of action to enforce 42 U.S.C § 5310. Indeed, it is in their Memorandum in Opposition to Motions to Dismiss Statutory Claims, at 14-23, not in the complaint, that plaintiffs first make this legal argument with specificity. See also Memorandum of Law in Reply to Plaintiffs' Memorandum of Law in Opposition to Municipal Defendants' Motion to Dismiss the Complaint at 6-7; Defendant CPC's Reply to Plaintiffs' Memorandum in Opposition to CPC's Motion to Dismiss Count I at 1-2. Nevertheless, because courts are "required to read the complaint with great generosity on a motion to dismiss," Yoder v. Orthomolecular Nutrition Institute, Inc.,751 F.2d 555, 558 (2d Cir. 1985) (citing Conley v. Gibson, 355 U.S. 41, 47-48 (1957)), the Court finds an implied "implied private right of action" claim in the instant complaint and will therefore address that claim in its opinion. This was also the finding of the magistrate judge. Report and Recommendation at 10. Thus, each defendant has had two opportunities (once in their reply memoranda to their motions to dismiss and once in their responses to the objections to the magistrate judge's report and recommendations) to address plaintiffs' assertion that there is an implied private right of action pursuant to § 5310.

According to plaintiffs, from 1986 to 1989, CPC entered into a series of three annual contracts with HPD (the "CPC/HPD Contracts") for the "performance of construction, repair and rehabilitation work on real estate owned by the City of New York". Complaint at ¶ 44. Plaintiffs are laborers that CPC employed to perform the work required under the terms of these contracts.

The CPC/HPD Contracts were funded in whole or in part under Title I of the Housing and Community Development Act of 1974 ("HCDA"), 42 U.S.C. § 5301 et seq., which provides that "[t]he primary objective of this [title] is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." Id. § 5301(c).

42 U.S.C. § 5310, which is part of Title I of the HCDA, provides, in relevant part, that:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a -- 276a-5).... The Secretary of Labor shall have, with respect to such labor

> standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950[4] (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

Because the CPC/HPD Contracts were funded under Title I of the HCDA, they were subject to, inter alia, the provisions of § 5310. This was explicitly stated in the CPC/HPD Contracts, which provided, in a section entitled "Federal Supplemental Terms and Conditions," that:

> [CPC] acknowledges that this Agreement is funded under a program providing direct financial assistance from the Federal government to the City and HPD and is subject to, and the Contractor shall comply with, the requirements of all applicable Federal Statutes, rules and regulations,

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[4] Reorganization Plan Numbered 14 of 1950 ("the Reorganization Plan") authorized the Secretary of Labor to make reasonable regulations to ensure compliance with the Davis-Bacon Act and related statutes, such as the HCDA. The regulatory regime established under the Reorganization Plan allows contractors and laborers to challenge the setting and application of Davis-Bacon wage standards and provides for contractors to be debarred for up to three years from eligibility for applicable contracts as a deterrent to the willful violation of labor standards in federal contracting. Significantly, the Reorganization Plan does not provide for an action by laborers for back wages claimed under the Davis-Bacon standards.

> including, but not limited to, those set forth in Exhibit F attached to this agreement.

Included among the "applicable Federal Statutes" in Exhibit F were Title I of the HCDA, as well as the Davis-Bacon Act.

Plaintiffs assert that they were not paid prevailing wage rates, as determined by the Secretary of Labor. In their Memorandum in Opposition to Motions to Dismiss Statutory Claims, plaintiffs state that municipal defendants issued a Request for Proposals ("RFP") and ultimately signed a contract with CPC which provided that the Person Day Rate applicable to the HCDA work could not exceed $90 per diem.[5] Plaintiffs argue that, once CPC's other expenses were deducted the $90 cap on the Person Day Rate "ensured that each [laborer] would be paid far below the prevailing wage rate." Id. at 4.

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[5] The Person Day Rate increased to $95 per day for the second and third round RFPs and contracts.

## DISCUSSION

Defendants' motions present this Court with two distinct, yet related, areas of inquiry. First, the Court must determine whether 42 U.S.C. § 5310 creates a right of action under 42 U.S.C. § 1983. This inquiry turns on: (a) whether defendants were acting under color of state law; (b) whether 42 U.S.C. § 5310 creates an enforceable "right, privilege or immunity," as required under 42 U.S.C. § 1983; and (c) whether Congress intended to foreclose a 42 U.S.C. § 1983 right of action under 42 U.S.C. § 5310. Second, the Court must ascertain whether plaintiffs have an implied private right of action 42 U.S.C. § 5310.

Part (a) of the first inquiry requires a fact-specific analysis. Parts (b) and (c) of the first inquiry, as well as the second inquiry, present questions of statutory interpretation which are issues of first impression for the federal courts.

After discussing the standards to be applied when reviewing a magistrate judge's report and recommendations and deciding a Rule 12(b)(1) or 12(b)(6) motion to dismiss, the Court will turn to these substantive issues.

## A. Standards for Reviewing a Magistrate Judge's Report and Recommendations

To accept the Report and Recommendations of a magistrate judge to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record. See Rule 72, Fed. R. Civ. P., Notes of Advisory Committee on Rules (citing Campbell v. United States Dist. Court, 501 F.2d 196, 206 (9th Cir.), cert. denied 419 U.S. 879 (1974)). 28 U.S.C. § 636(b)(1) affords the district court broad latitude in considering a magistrate judge's recommendation, even if no party objects to it. Grassia v. Scully, 892 F.2d 16, 19 (2d Cir. 1989). When timely objection has been made to a portion or portions of a magistrate judge's report, however, the district judge must "make a de novo determination . . . of any portion of the magistrate's disposition to which specific written objection has been made." Rule 72(b), Fed. R. Civ. P. See also, 28 U.S.C. § 636(b) (1). The judge may then accept, reject, or modify, in whole or in part, the magistrate judge's proposed findings and recommendations. 28 U.S.C. § 636 (b) (1).

A district court's obligation to make a de novo determination of properly contested portions of a magistrate judge's report does not require that the judge conduct a de novo hearing on the matter. United States v. Radatz, 447 U.S. 667, 676 (1980). It is sufficient that the district court "arrive at its own, independent conclusion about those portions of the [magistrate judge's] [report to which objection is made." Hernandez, v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983). To this end, the court must

"exercise ... sound judicial discretion with respect to whether reliance should be placed on [the magistrate judge's] findings." American Express Int'l Banking Corp. v. Sabet, 512 F. Supp. 472, 473 (S.D.N.Y. 1981), aff'd without opinion, 697 F.2d 287 (2d Cir.), cert. denied, 459 U.S. 858 (1982).

## B. Standards for Dismissal Pursuant to Rules 12(b)(1) and 12(b)(6)

### 1. Rule 12(b)(1)

Municipal defendants have moved to dismiss the First Amended verified Complaint pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of jurisdiction over the subject matter. When such a defense is asserted, " 'the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined.' " Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n, 896 F.2d 674, 678 (2d Cir. 1990) (quoting 5 C. Wright and A. Miller, Federal Practice and Procedure, § 1350, p. 548 (1969)).

Plaintiffs claim subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. Section 1331, which confers jurisdiction when there is a federal question, provides that, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." Inasmuch as this action arises under 42 U.S.C. § 1983, as well as under 42

U.S.C. § 5310, there is the requisite subject matter jurisdiction pursuant to 28 U.S.C. § 1331.[6]

In accordance with this analysis, the portion of municipal defendants' motion made pursuant to Rule 12(b)(1) is denied.

2. **Rule 12(b)(6)**

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, a court is required to accept the facts alleged in the complaint as true. Frasier v. General Electric Co., 930 F.2d 1004, 1007 (2d Cir. 1991) (citing Cooper v. Pate, 378 U.S. 546 (1964)). The complaint includes any written instrument attached to it as an exhibit and any statements or documents incorporated into it by reference. Cortec Industries, Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991), cert. denied, 112 S. Ct. 1561 (1992); Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir. 1985).

In the instant case, the CPC/HPD Contracts and the RFPs were neither attached to the complaint nor incorporated into it by reference. It is undisputed by the parties, however, that these documents are properly before the Court on this motion to dismiss, because plaintiffs clearly had notice of these documents and relied upon them in framing the complaint. See Cortec Industries, Inc. v.

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[6] Because this Court finds subject matter jurisdiction pursuant to 28 U.S.C. § 1331, it is unnecessary to decide whether jurisdiction exists pursuant to 28 U.S.C. § 1337.

Sum Holding L.P., 949 F.2d at 48; Memorandum of Law in Support of Municipal Defendants' Motion to Dismiss the Complaint at 4n.2; Plaintiffs' Memorandum in Opposition to Motions to Dismiss Statutory Claims at 3 n.1.

The court must read the complaint generously, and draw all reasonable inferences in favor of plaintiffs. Pross v. Katz, 784 F.2d 455, 457 (2d Cir. 1986). The complaint may be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Branum v. Clark, 927 F.2d 698, 705 (2d Cir 1991). Thus, "[the function of a [Rule 12(b)(6)] motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 779 (2d Cir. 1984) (quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)). The Court now turns to the legal feasibility of the plaintiffs' federal claims.

## C. Plaintiffs' § 1983 Claim

The Court must determine whether 42 U.S.C. § 5310 provides plaintiffs with a cause of action pursuant to 42 U.S.C. § 1983, which provides, in relevant part,

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States

> or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress.

(emphasis added)

In their motions to dismiss, defendants assert that plaintiffs cannot satisfy either the "state action" or the "rights, privileges or immunities" requirement. Further, defendants assert that there is no § 1983 right of action, because Congress intended to foreclose such a right of action under § 5310. The Court now turns to these arguments.

### 1. Were Defendants Acting Under Color of State Law?

To state a claim against a private actor under § 1983, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional or unlawful act. Spear v. Town of West Hartford, 954 F.2d 63, 68 (2d Cir. 1992), petition for cert. filed, May 20, 1992. Defendants assert that plaintiffs' complaint fails to allege facts which would establish that CPC's alleged failure to pay prevailing wages was under color of state law. Plaintiffs bear the burden of proving that the acts of private entities constitute state action for purposes of § 1983. Flagg Brothers, Inc. v. Brooks,

436 U.S. 149, 155 (1978); Hadges v. Yonkers Racing Corp., 918 F.2d 1079, 1082 n.3 (2d Cir. 1990), cert. denied, 11 S.Ct. 1583 (1991).

The Second Circuit has recently addressed the issue of when private conduct qualified as state action for § 1983 purposes. In Hadges, the court was asked to decide whether the Yonkers Racing Corporation ("YRC"), as the private owner of a racetrack licensed by the State of New York to conduct parimutuel wagering on harness races, engaged in § 1983 state action when it denied Hadges' application to work at YRC's racetrack. Hadges contended that YRC's denial of his application amounted to § 1983 state action because YRC was subject to pervasive New York State statutory and regulatory control, and because it generated significant tax revenues for the State, received State tax credits, and held a monopoly over harness racing in the New York metropolitan area. Id. at 1080-81.

The Court identified two independent tests for determining whether there is a state action: the symbiotic relationship test and the close nexus test. Either test is sufficient to establish § 1983 state action.

**a. The Symbiotic Relationship Test**

Private action is transformed into state action under this test when " '[t]he State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity.' " Hadges v. Yonkers Racing Corp.,

918 F.2d at 1081 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715 725 (1961)).

In Burton, where this test was first articulated by the Supreme Court, the owner of a private restaurant that leased space in a state-owned building refused to serve an African-American. The Court found that the restauranteur's action qualified as § 1983 state action because the state owned the building, as well as an adjacent parking lot, and thus had a direct financial interest in the restaurant's success. In addition, the state had dedicated the building for public purposes, thereby conferring tax exempt status on the building. Hadges v. Yonkers Racing Corp., 918 F.2d at 1082 (citing Burton v. Wilmington Parking Auth., 365 U.S. at 723-24).

While courts are to search for "nonobvious involvement of the State in private conduct," Burton v. Wilmington Parking Auth., 365 U.S. at 722, the Second Circuit in Hadges did not find the nature or extent of state involvement that was present in Burton. In contrast to Burton, the State in Hadges did not have a proprietary interest in Yonkers Raceway, which was purchased and maintained by private, not public dollars. Furtheremore, the State in Hadges did not own a neighboring, interlinked business, and consequently lacked the direct financial stake in YRC's success that was present in Burton. While YRC received tax credits from the State, YRC did not enjoy the State's tax-exempt status. Finally, the Hadges court noted that the State did receive greater revenues if YRC prospered, but the court held that if such a link were sufficient to forge a symbiotic relationship between YRC and the State, then the actions of every successful

corporation within the State would qualify as state action. Hadges v. Yonkers Racing Corp., 918 F.2d at 1082.

In sum, the symbiotic relationship test seeks to establish whether the overall interests of the government and the private actor overlap to such an extent as to virtually coincide.

**b. The Close Nexus Test**

Whereas the symbiotic relationship test focuses on the state's overall relationship with the private actor, the close nexus test specifically examines the state's link to the challenged action. Hadges v. Yonkers Racing Corp., 918 F.2d at 1082. Under this test, private action is transformed into state action when " 'there is a sufficiently close nexus between the State and the challenged action' that the private party's action 'may be fairly treated as that of the State itself.' " Id. at 1081 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

The "close nexus" standard is a difficult one to attain. For example, the mere fact that a business is subject to state regulation does not by itself convert its action into that of the state. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544 (1987). Nor does the fact that the regulation is extensive and detailed, as in the case of most privately-owned utilities, create state action. Jackson v. Metropolitan Edison Co., 419 U.S. at 350. Furthermore, even when an entity benefits from state-conferred monopoly status, this is not sufficient state action for § 1983. Id. at 351-52.

Indeed, the government may subsidize private entities without assuming constitutional responsibility for their actions. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 544 (citing Blum v. Yaretsky, 457 U.S. 991, 1011 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982). "The fact 'that a private entity performs a function which serves the public does not make its acts governmental action.'" San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 544 (quoting Rendell-Baker v. Kohn, 457 U.S. at 842). Of relevance to the instant case, private entities who contract with the government are not necessarily government actors. Rendell-Baker v. Kohn, 457 U.S. at 840-41 (a "school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.") Furthermore, "'mere approval of or acquiescence in the initiatives' of [a private actor] . . . is not enough to make the [private actor's] actions those of the Government." San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 547 (quoting Blum v. Yaretsky, 457 U.S. at 1004-05).

Thus the close nexus test establishes a relatively small range of government action for purposes of § 1983: "a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be

deemed to be that of the government'". San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 546 (quoting Blum v. Yaretsky, 457 U.S. at 1004; Rendell-Baker v. Kohn, 457 U.S. at 840) (citing Flagg Brothers, Inc. v. Brooks, 436 U.S. at 160; Jackson v. Metropolitan Edison Co., 419 U.S. at 357; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970))(emphasis added).

Upon application of the close nexus test, the Hadges court found no state action, holding that "there is no evidence that a State official participated in YRC's decision to deny Hadge's application."[7] Hadges v. Yonkers Racing Corp., 918 F.2d at 1083.

**c. The Symbiotic Relationship Test and Close Nexus Test as Applied to the RFPs and CPC/HPD Contracts**

In determining whether either of these tests results in a finding of § 1983 state action, this Court must

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[7] However, the Hadges court did cite to Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 599 (3d Cir. 1979), cert. denied, 446 U.S. 956 (1980), where the Third Circuit held that if a State official "personally and actively participated" in a racetrack's decision to expel a driver, state action existed. Thus the Hadges court acknowledged that there are circumstances where the close nexus test does create § 1983 state action. Hadges v. Yonkers Racing Corp., 918 F.2d at 1083.

ultimately undertake a detailed factual inquiry. "Neither of these tests lends itself to formulaic applications. Instead, both of these inquires requires us to sift through and weigh the facts to determine whether the alleged ties between the State and the private actor are sufficiently strong to attribute the private actor's conduct to the state." Hadges v. Yonkers Racing Corp., 918 F.2d at 1081 (citing Burton v. Wilmington Parking Auth., 365 U.S. at 722. See also Jackson v. Metropolitan Edison Co., 419 U.S. at 351 ("The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met." (citing Burton v. Wilmington Parking Auth., 365 U.S. 715)). For purposes of the instant motions to dismiss, in accordance with Rule 12(b)(6) standards, the Court will accept the facts alleged in the complaint as true and will consider the CPC/HPD Contracts and the RFPs.

CPC was not a state actor under the symbiotic relationship test. Neither municipal defendant had the sort of interdependent economic interest that is required under the Burton test. Municipal defendants did not share a proprietary interest with CPC in the work being done. Nor did the municipal defendants have an "interlinked" business, as was the case with the State's parking lot in Burton. For these reasons, the symbiotic relationship test does not establish § 1983 state action in the instant case.

Under the close nexus test and the facts presently before the Court, however, CPC can be said to be a state actor. On the basis of the CPC/HPD Contracts and the RFPs, plaintiffs have alleged facts which, if proven true,

would demonstrate that municipal defendants had "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government." San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 546 (citations omitted). In particular, plaintiffs assert that the $90-95 cap on the Person Day Rate, which was required by municipal defendants as a condition for awarding the contract, was so low as to make it financially impossible for CPC to pay prevailing wage rates as required under 42 U.S.C. § 5310. In short, plaintiffs have alleged facts asserting that the municipal defendants ensured that any successful bidder would be forced, for economic reasons, to violate 42 U.S.C. § 5310. If proven true, these facts would be sufficient to demonstrate that the municipal defendants "exercised coercive power or . . . provided such significant encouragement" as to establish 42 U.S.C. § 1983 state action under the close nexus test.[8]

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[8] Municipal defendants have argued that, because part of CPC's contractual mandate was to provide off-site "life skills" training to plaintiffs, and thus plaintiffs were not laboring on-site for CPC on a full-time basis, the $90-95 Person Day Rate was sufficient to allow CPC to pay the prevailing minimum wage during those hours of the week when plaintiffs were actually providing labor services. See Memorandum of Law in Reply to Plaintiffs' Memorandum of Law in Opposition to Municipal Defendants' Motion to Dismiss the Complaint at 26. This assertion, while relevant to the ultimate adjudication of this action, concerns a factual argument raised by defendants that is not properly before

(continued...)

Finally, municipal defendants argue that plaintiffs have failed to adequately plead the existence of a municipal custom, practice or policy which caused plaintiffs' injuries. However plaintiffs did allege that HPD's conduct "was pursuant to official custom, policy and usage." Amended Complaint at ¶ 55. Moreover, it strains credulity to assert, as municipal defendants have, that a series of contracts, worth millions of dollars in the aggregate, and signed by the Commissioner of HPD, do not reflect official policy or usage.[9]

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[8] (...continued)
the Court on a Rule 12(b)(6) motion to dismiss.

[9] Because the Court has found state action under the close nexus test, it is unnecessary to address plaintiffs' conspiracy claim, First Amended Verified Complaint at ¶ 53, at the present time.

2. Does 42 U.S.C. § 5310 Create a "Right, Privilege or Immunity," as Required Under 42 U.S.C.§ 1983?

a. The Existing Framework

The jurisprudence concerning whether a given statute created a right, privilege or immunity enforceable under § 1983 is in a state of flux. In Wilder v. Virginia Hospital Ass'n, 110 S.Ct. 2510 (1990), the Supreme Court applied a well-established, three-part test in finding that the Boren Amendment to the Medicaid Act created such a right. However in Suter v. Artist M., 112 S.Ct. 1360 (1992), decided approximately two months ago, the Supreme Court chose not to explicitly apply the Wilder framework when determining whether such a right exists, although it did not explicitly overrule Wilder and provided no alternative analytic framework. Because the Wilder framework was not explicitly overruled,[10] this Court will apply the Wilder

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[10] Justice Blackmun, in a stinging dissent, indicates that the Suter majority is dramatically altering, if not overruling, Wilder:

> the court has failed, without explanation, to apply the framework our precedents have consistently deemed applicable; it has sought to support its conclusion by resurrecting arguments decisively rejected less than two years ago in Wilder; and it has contravened 22 years of precedent by suggesting that the

(continued...)

framework, with the modifications suggested by Suter, in *ascertaining whether 42 U.S.U. § 5310 created a right* enforceable under § 1983.[11]

Section 1983 provides a cause of action for violations of federal statutes as well as the Constitution. Maine v. Thiboutot, 448 U.S. 1, 4 (1980); Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517. There is no cause of action, however, when " 'the statute does not create enforceable rights, privileges, or immunities within the meaning of § 1983 ' " Id. (quoting Wright v. Roanoke

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[10] (...continued)

> existence of other "enforcement mechanisms" precludes § 1983 enforcement. At least for this case, it has changed the rules of the game without offering even minimal justification, and it has failed even to acknowledge that it is doing anything more extraordinary than "interpreting" the [relevant act] "by its own terms." Readers of the Court's opinion will not be mislead by this hollow assurance.

Suter v. Artist M., 112 S.Ct. at 1377.

[11] In the approximately two months since Suter was decided, no federal court has addressed the issue of whether the Wilder framework is still good law.

Redevelopment and Housing Auth., 479 U.S. 418, 423 (1987)).

Under this exception, a mere violation of federal law is not sufficient to trigger § 1983. Rather plaintiff must demonstrate that he or she was deprived of a right, privilege, or immunity. Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517; Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)). In determining whether such a right, privilege or immunity exists, the Court must ascertain (1) whether " 'The {statutory} provision in question was intended to benefit the putative plaintiff' " Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517 (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. at 106). If so, the provision creates an enforceable right unless (2) "it reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit," Wilder v. Virginia Hospital Ass'n 110 S.Ct. at 2517 (citing Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 19 (1981)), or unless (3) the asserted interest is " 'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.' " Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517 (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. at 108; Wright v. Roanoke Redevelopment and Housing Auth., 479 U.S. at 431-32).

Applying this test in Wilder, the Supreme Court found that the Boren Amendment to the Medicaid Act created a right enforceable by the health care providers under § 1983. First, the Court found that "[t]here can be

little doubt that health care providers are the intended beneficiaries of the Boren Amendment. The provision ... is phrased in terms of benefitting health care providers." Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517-18. Second, the Wilder court found that the Boren Amendment was "cast in mandatory rather than precatory terms: the state plan 'must' 'provide for payment of hospitals.'" Wilder v. Virginia Hospital Ass'n, 110 S.St. at 2519. "'The Boren Amendment's language succinctly sets forth a congressional command, which is wholly uncharacteristic of a mere suggestion or 'nudge'.'" Wilder v. Virginia Hospital Ass'n 110 S.Ct. 2519 (quoting West Virginia University Hospitals, Inc. v. Casey, 885 F.2d 11, 20 (3d Cir., 1989).

The Suter court did not explicitly apply the three-part "right" test of Wilder and its precursors. Although the Court did not provide an analytic framework for deciding § 1983 right of action cases, it did establish certain guidelines to be followed in determining whether there is a § 1983 of action.

In Suter, the Court held that there is no private right of action to enforce the Adoption Assistance and Child Welfare Act of 1980 (the "AACWA"), either implicitly, under the AACWA itself, or through a § 1983 action. The Suter court distinguished the AACWA from the statute in Wilder, writing that, "in [Wilder], we held that the Boren Amendment actually required the States to adopt reasonable and adequate rates, and that this obligation was enforceable by the providers. We relied in part on the fact that the statute and regulations set forth in some detail the

factors to be considered in determining the methods for calculating rates." Suter v. Artist M., 112 S.Ct. at 1368. The Suter Court concluded that, in providing that the State exercise "reasonable efforts" in maintaining a abused or neglected child in his home or return the child to his foster care, the AACWA left the question of how to define "reasonable efforts" up to the State. Id. Thus, the Court reasoned, the AACWA did not create an enforceable right.

In addition, the Suter court wrote that, "[c]areful examination of the language [requiring 'reasonable efforts'], in the context of the entire [AACWA], leads us to conclude that the 'reasonable efforts' language does not unambiguously confer an enforceable right upon the [AACWA's] beneficiaries. The term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." Id. at 1370 (emphasis added). Thus, under Suter, any right must be unambiguously conferred.

Finally, the Court noted that the regulations promulgated by the Secretary of Health and Human Service to enforce the AACWA

> do not evidence a view that [the AACWA] places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary.... What is significant is that the [AACWA] regulations are not specific, and do not provide notice to the States that failure

> to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government.

Id. at 1369. Thus the Court found that the burdens placed on the State under the AACWA were procedural, not substantive.

While the Suter court's approach to analyzing the AACWA is ad hoc, there are several guidelines at work. First, the right allegedly created by Congress must be specific and unambiguous. The statutory requirement that the State exercise "reasonable efforts," the Court ruled, was too general and ambiguous to establish a right. Finally, the Court found that the AACWA requirements were merely procedural, not substantive.

**b. The Existing Framework as Applied to 42 U.S.C. § 5310**

Under the Wilder framework, the first question to be asked is whether the statutory provision was intended to benefit plaintiffs. There can be little doubt that § 5310 is intended to provide laborers with higher wages than they would receive in the absence of this section. The congressional word choice in § 5310, particularly when viewed in contrast to other statutory provisions concerning prevailing wage requirements, reflects an unambiguous focus on construction workers: "[a]ll laborers and mechanics employed by contractors or subcontractors in the

performance of construction work financed ... with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality" (emphasis added). This can be contrasted with a provision in Title II of the HCDA, amending the United States Housing Act of 1937, which provided that,

> [a]ny contract ... pursuant to this chapter shall contain a provision requiring that ... not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act, shall be provided to all laborers and mechanics employed in the development of the project involved.

42 U.S.C. § 1437j (emphasis added). The § 1437j language, with its emphasis on the contract, can properly be viewed as creating a duty on the contractor, rather than creating a right for the laborers/mechanics.

The contrast between § 1437j and § 5310 is significant. In drafting § 5310, if Congress had wished to focus on the contract itself, rather than establish a right for workers, it certainly knew how to do so. Thus the wording of § 1437j is strong evidence that Congress intended to create a right for laborers and mechanics under § 5310.

Alternatively, Congress could have focused on the government's responsibility, as it did in 33 U.S.C. § 1372, which provides:

> The Administrator [of the Environmental Protection Agency] shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on treatment works for which grants are made under this chapter shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act.

On the basis of this language, the Fifth Circuit, in United States ex rel. Glynn v. Capeletti Bros., Inc., 621 F.2d 1309 (5th Cir. 1980), concluded that Congress did not intend to confer benefits directly on laborers, but rather to impose a duty on a federal agency to insure that certain wages were paid. It is significant that § 1372 was enacted prior to the HCDA, in 1972, because this is further evidence that Congress knew how to place a burden on a federal agency, rather than confer a right on laborers/mechanics, when it chose to do so.

It is also instructive to compare the language of § 5310 to the language used in the Davis-Bacon Act itself, which, like 42 U.S.C. § 1437j, has contracts, not laborers, as its focus. That statute provides that:

> [t]he advertised specifications for every contract in excess of $2,000 to which the United States ... is a party, for construction, alteration and/or repair ... of public buildings

> or public works of the United States ... which requires or involves the employment of mechanic and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing [wages].

40 U.S.C. § 276a(a).

In Universities Research Assn. v. Coutu, 450 U.S. 754 (1981), the Supreme Court sought to determine whether this Davis-Bacon Act provision created a right in the mechanics and laborers:

> [s]ection 1 of the Davis-Bacon Act requires that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, but it does not confer rights directly on those individuals. Since § 1 is simply 'phrased as a directive to federal agencies engaged in the disbursement of funds,' its language provides no support for the implication of a private remedy.

Id. at 772-73 (emphasis added) (citing Cannon v. University of Chicago, 441 U.S. 677, 693 n. 14 (1979)).[12]

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[12] Although the Coutu court's inquiry concerned the alleged existence of an implied private right of action, rather (continued...)

Defendants point to Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Dev., 799 F.2d 774, 793-95 (1st Cir. 1986) to argue that the language of § 5310, when viewed in the context of the primary congressional purpose in passing Title I of the HCDA, does not create a right in laborers and mechanics. In Latinos Unidos, the First Circuit found that 42 U.S.C. § 5309, which prohibits discrimination on the basis of race, color, national origin, or sex in connection with programs or activities funded under Title I of the HCDA, did not create an implied private right of action. The First Circuit reasoned that the purpose of the HCDA was not the prevention of discrimination, noting that Title I of the HCDA "was passed in response to Congress' concern for the 'critical social, economic and environmental' conditions existing in the nation's cities. The statute's primary objective was 'the development of viable urban communities.'" Id. at 793 (quoting 42 U.S.C. §§ 5301(a) & (c)). Thus the Latins Unidos court found that, because Title I was not enacted for the "especial benefit" of the minority community, 42 U.S.C. § 5309 did not create a private right of action for discrimination.

When interpreting § 5310, this Court will apply the general principle that "a statute should be read according to its literal terms, unless this produces an interpretation which makes little sense, does violence to the

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[12] (...continued)
than a § 1983 right of action, the analysis as to whether there is a right created by a statutory provision is the same for each inquiry.

purposes Congress sought to serve by the statute, or is otherwise 'demonstrably at odds with the intentions of the statutes drafters.'" Metropolitan Transp. Auth. v. F.E.R.C., 796 F.2d 584, 591 (2d Cir. 1986) (citations omitted), cert. denied, 479 U.S. 1085 (1987).

With this principle in mind, this Court concludes that finding a right for laborers and mechanics under § 5310 is entirely consistent with the overall congressional purpose in enacting Title I of the HCDA. Congress stated that "[t]he primary objective of [Title I of the HCDA] is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c) (emphasis added). Thus, the instant case is distinguishable from Latinos. There can be little doubt that, if CPC had paid the prevailing wage, rather than the substantially lower wage actually paid to plaintiffs, this would have provided expanded economic opportunities for persons of low or moderate income, namely plaintiffs.[13]

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[13] Economists and other public policy makers debate the value to those of low and moderate incomes of having a wage floor, either in the form of a federal minimum wage or a prevailing wage. While a wage floor increases the welfare of those who are hired, it is arguable that, if there were no prevailing wage requirement, social utility would be increased because contractors would be able to hire more workers on a fixed labor budget. It is, however, not the function of the courts to resolve this policy debate. It is

(continued...)

The Court must next ask whether § 5310 contains merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit. The language of § 5310 indicates that Congress sought to create a binding obligation on the governmental unit. In particular, § 5310 provides that employees on construction projects financed under Title I of the HCDA "shall" be paid at least prevailing wages, as determined by the Secretary of Labor. As discussed above, had Congress wished to create a procedural requirement that contracts contain certain terms, rather than a binding obligation toward laborers and mechanics, they could have done so, using language such as was in 42 U.S.C. § 1437j.

Furthermore, in applying the third part of the Wilder test, the interest that the plaintiffs assert is not "too vague and amorphous such that it is beyond the competence of the judiciary to enforce." Pursuant to § 5310, the Secretary of Labor is required to establish, with great

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[13] (...continued)
enough for the Court to find that Congress could have believed that a prevailing wage provision would serve the purpose of "expanding economic opportunities, principally for persons of low and moderate income." Although there is nothing in the statute itself or its legislative history which explicitly establishes that Congress had this causal link in mind when it enacted Title I of the HCDA, the fact that Congress included § 5310 in this title is sufficient to establish that Congress thought § 5310 would, at a minimum, not be inconsistent with the purposes of Title I.

specificity, prevailing wage rates to be paid laborers and mechanics.

Under the Suter court's guidelines, § 5310 also creates a § 1983 right of action. First, unlike the "reasonable efforts" clause to the AACWA, the right to prevailing wages under § 5310 (as determined by the Secretary of Labor) creates an unambiguous, specific benchmark. The contractor knows exactly what wage rates will need to be paid and, as discussed supra, rights are unambiguously conferred on laborers and mechanics. Finally, because the "shall" requirement of § 5310 is directed at the payment of workers' wages, rather than compelling the inclusion of a contract provision (as in 42 U.S.C. § 1437j), the requirement is substantive, not procedural. For these reasons, this Court finds that 42 U.S.C. § 5310 unambiguously conferred a specific substantive right on plaintiffs under the Suter standards.

### 3. Did Congress Foreclose § 1983 Enforcement of § 5310?

#### a. The Existing Framework

The general rule that a violation of federal law creates a § 1983 right of action has a second exception: when Congress has foreclosed § 1983 enforcement of a given statute in that statute itself. However, a court should not " 'lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right.' " Wilder v. Virginia Hosp. Ass'n, 110 S.Ct. at 2523 (quoting Wright v. Roanoke

Redevelopment & Housing Auth., 479 U.S. at 423-24 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)).

Thus, there is a heavy burden on a defendant to demonstrate that Congress intended to foreclose a § 1983 remedy. As the Wilder court wrote, in rejecting the government's argument that Congress foreclosed enforcement of the Medicaid Act under § 1983:

> [t]he burden is on the State to show "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." Wright, 479 U.S. at 423.... In the absence of such an express provision, we have found private enforcement foreclosed only when the statute itself creates a remedial scheme that is "sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1, 20 (1981).

Wilder v. Virginia Hospital Assn., 110 S.Ct. at 2523. Furthermore, "[t]he availability of administrative mechanisms to protect plaintiff's interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy. Rather the statutory framework must be such that 'allowing a plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored

scheme.'" Golden State Transit Corp. v. City of Los Angeles, 493 U.S. at 106-07 (citations omitted).

The "sufficiently comprehensive" test is rarely met. As the Wilder court noted,

> [o]n only two occasions have we found a remedial scheme established by Congress sufficient to displace the remedy provided in § 1983. In Sea Clammers, we held that the comprehensive enforcement scheme found in the Federal Water Pollution Control Act -- which granted the Environmental Protection Agency considerable enforcement power through the use of noncompliance orders, civil suits and criminal penalties, and which included two citizen suit provisions -- evidenced a congressional intent to foreclose reliance on § 1983.... Similarly, in Smith v. Robinson, we held that the elaborate administrative scheme set forth in the Education of the Handicapped Act manifested Congress' desire to foreclosure private reliance on § 1983 as a remedy. The EHA contained a 'carefully tailored administrative and judicial mechanism' that included local administrative review and culminated in a right to judicial review.

Wilder v. Virginia Hospital Assn., 110 S.Ct. 2523-24 (citations omitted).

The Wilder court concluded that the administrative scheme established pursuant to the Boren Amendment to the Medicaid Act could not be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983, noting that, "[i]n Wright, we concluded that the 'generalized powers' of HUD to audit and cut off federal funds were insufficient to foreclose reliance on § 1983 to vindicate federal rights. We noted that HUD did not exercise its auditing power frequently and the statute did not require, nor did HUD provide, any mechanism for individuals to bring problems to the attention of HUD." Wilder v. Virginia Hospital Assn., 110 S.Ct. at 2523.

This Court must now determine whether the administrative enforcement scheme of § 5310 is "sufficiently comprehensive", such that allowing a § 1983 action would be inconsistent with Congress' carefully tailored enforcement scheme.[14]

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[14] In dicta, the Suter court determined that other sections of the AACWA provide enforcement mechanisms for the "reasonable efforts" clause of the Act, and suggested that even a non-comprehensive statutory enforcement scheme might preclude a § 1983 right of action: "[w]hile the [AACWA's] statutory provisions may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983, they do show that the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter." Suter v. Artist M., 112 S.Ct. at 1368-69. See (continued...)

b. **The Existing Framework as Applied to 42 U.S.C. § 5310**

Nowhere is the HCDA did Congress explicitly foreclose § 1983 enforcement of § 5310. The Court will therefore seek to determine whether Congress implicitly foreclosed § 1983 enforcement of § 5310.

As an initial matter, it is helpful to view § 5310 as establishing two mechanisms in the context of Title I of the HCDA: (1) the predetermination of a prevailing wage and (2) the enforcement of a contractor's obligation to pay that wage. While it may be that allowing a § 1983 right of action to challenge the Secretary's predetermination of a prevailing wage rate would upset

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[14] (...continued)
also, id. at 1377 (Blackmun, J., dissenting) ("[the Court] has contravened 22 years of precedent by suggesting that the existence of other 'enforcement mechanisms' precludes § 1983 enforcement"). However, because the Suter court found that the AACWA did not create an enforceable right, the Court did not reach the issue of whether a statutory enforcement scheme that could be characterized as non-comprehensive would preclude a right of action under § 1983. Id at 1368 n.11. Therefore this Court will continue to follow the precedent of Wilder and its predecessors in finding that only a "comprehensive" statutory scheme will preclude a § 1983 right of action.

Congress' carefully tailored scheme in enacting § 5310,[15] the same cannot be said of a § 1983 right of action seeking to enforce a contractor's obligation to pay the predetermined wage.

In analyzing the Davis-Bacon Act, as amended, the Supreme Court found that it represented a balancing between the interests of laborers and of contractors. The contractor's interest lies in being able to "know definitely in advance of submitting his bid what his approximate labor costs will be," while the laborers' interest lies in protecting local wage standards. Universities Research Assn. v. Coutu, 450 U.S. at 773, 775, 782. There is no reason to believe that the interests Congress sought to balance in enacting § 5310 are any different.

In the instant case, the predetermination of prevailing wage rates by the Secretary of Labor provided CPC with certainty when preparing its bid. Plaintiffs do not challenge the Secretary's determination in this regard. Any private enforcement, pursuant to § 1983, of the contractor's obligation to pay would not upset the contractor's interest in having a predetermined wage rate to factor into a bid. Thus a private right of action pursuant to § 1983 does not upset

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[15] Because this issue is not before the Court in the instant action, it is not necessary to decide that matter. However, under the Davis-Bacon Act, the correctness of the Secretary's wage rate determination is not subject to judicial review. Universities Research Assn. v. Coutu, 450 U.S. at 761 n.10 (citing United States v. Binghamton Constr. Co., 347 U.S. 171, 177 (1954)).

the balance of Congress' "carefully tailored scheme" that is at the heart of § 5310.

Defendants point to the finding of the Supreme Court in Universities Research Assn. v. Coutu, 450 U.S. at 783, that, "[t]he implication of a private right of action here would undercut as well the elaborate administrative scheme promulgated pursuant to Reorganization Plan No. 14." The issue in Coutu, however, was whether the Davis-Bacon Act conferred a private right of action on an employee under a contract that had been predetermined by the Secretary of Labor not to call for Davis-Bacon work. Thus the employee in Coutu was challenging a predetermination ruling by the Secretary of Labor concerning whether a contract is covered by Davis-Bacon. If contractors had to worry that such predetermination rulings might be upset in judicial post-contract coverage rulings, the benefit of a predetermination ruling would be largely lost, i.e., contractors would not be able to accurately forecast their labor costs. It was this need for consistency, in determining which contracts are covered under Davis-Bacon and which are not, that the Coutu court had in mind when it concluded that, "[w]hatever may be the merits of allowing judicial review of these complex coverage determinations prior to contracting, it clearly would be inappropriate for a court to substitute its judgment for that of a contracting agency in a private action brought after the contract was let." Id. at 784. This conclusion is not, however, applicable in a situation, such as is presented in the instant case, where coverage is not in dispute and employees merely seek to

enforce that which was already predetermined: that § 5310 applies to the contract.

Defendants assert that allowing § 1983 right of action would contravene the purpose of the Reorganization Plan, as incorporated into § 5310, which is to "assure coordination of administration and consistency of enforcement of the labor standards." (emphasis added) However, as the President's transmittal message makes clear, this "consistency of enforcement" refers to a consistent approach to enforcement across government agencies, and thus would not preclude private enforcement:

> the Federal agencies involved in the administration of the various acts [including the Davis-Bacon Act] are divided into two classes: (1) agencies which contract for Federal public works or construction; and (2) agencies which lend or grant Federal funds . . . to aid in the construction of projects to be built by State or local public agencies or private individuals and groups. The methods of enforcing labor standards necessarily differ between these two groups of agencies.
>
> The methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity of enforcement is lacking and the degree of protection afforded workers varies from agency to agency.

> In order to correct this situation, this plan authorizes the Secretary of Labor to coordinate the administration of legislation relating to wages and hours on federally financed or assisted projects by prescribing standards, regulations and procedures to govern the enforcement activities of the various federal agencies and by making such investigations as he deems desirable to assure consistent enforcement.

Reorganization Plan Number 14 of 1950, Message of the President, 5 U.S.C. App. (emphasis added). Thus, the Reorganization Plan was designed to remedy inconsistent application of federal labor standards by federal administrative agencies. This congressional and presidential interest in a uniform approach to enforcement by federal agencies would not be undermined by a § 1983 right of action. Certainly there is no evidence that Congress or the President even considered private enforcement when they placed the "consistency of enforcement" language in the Reorganization Plan.

Furthermore, it cannot be said that the administrative enforcement scheme established pursuant to § 5310 is "sufficiently comprehensive" to preclude a § 1983 right of action. Unlike the comprehensive enforcement schemes in Sea Clammers and Smith v. Robinson, neither § 5310 nor the Reorganization Plan contain provisions for private judicial remedies. The federal regulation which establishes a procedure for the resolution of disputes concerning payment of wages under the Reorganization

Plan, 29 C.F.R. § 5.11(a), does not allow an employee to initiate such a procedure.[16] Only after a ruling on a wage dispute by the Administrator of the Department of Labor's Wage and Hour Division or an ALJ does an employee have an opportunity to initiate an action: he or she may appeal the ruling to the Wage Appeals Board, pursuant to 29 C.F.R. § 7.1 et seq.. There is, however, no right to judicial review of the Wage Appeals Board decision, except for procedural appeals under the Administrative Procedure Act. Although these opportunities for employees to enforce wage determinations are significant, they do not rise to the level of being "sufficiently comprehensive."

Finally, defendants' well-researched history of the Davis-Bacon Act and the various congressional efforts to amend the Davis-Bacon Act, in order to explicitly provide private judicial remedies, does not persuade the Court that Congress intended to preclude § 1983 actions under § 5310.

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[16] 29 C.F.R. § 5.11(a) provides that:

> This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency . . . . or upon request of the contractor or subcontractor(s).

(emphasis added).

Although the congressional reasons for enacting § 5310 undoubtedly mirror, in large part, the rationale behind the Davis-Bacon Act, as amended, it is important to keep in mind that there are fundamental differences between the two laws. Of greatest significance, the Davis-Bacon Act regulates contracts to which the federal government is a party and therefore there can be no § 1983 state action remedy. Thus, on the numerous occasions when Congress considered, and ultimately rejected, the creation of a private right of action under the Davis-Bacon Act, Congress could not have had in mind the preclusion of a § 1983 remedy, as no such remedy was then (or is now) available under the Davis-Bacon Act. Section 5310, in contrast, regulates contracts between a state or local government unit and contractor, and thus there may be state action for purposes of a § 1983 action. For this reason, the legislative history of the Davis-Bacon Act cannot be seen as demonstrating congressional intent to preclude a § 1983 remedy under § 5310. Finally, there is absolutely no evidence in the legislative history of the HCDA itself that Congress sought to foreclose a § 1983 remedy under § 5310.

Defendants have not demonstrated that: (a) the § 5310 administrative enforcement scheme is sufficiently comprehensive; (b) a § 1983 remedy would skew a carefully tailored enforcement scheme; or (c) there is any evidence in the text or legislative history of the HCDA of congressional intent to preclude a § 1983 action under § 5310. For these reasons, this Court finds that defendants have not met their heavy burden of proving that Congress intended to foreclose § 1983 enforcement of § 5310.

## D. Plaintiff's Implied Private Right of Action Claim

### 1. The Existing Framework

"[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. University of Chicago, 441 U.S. 677, 688 (1979). Rather courts must determine whether a federal statute creates an implied private right of action by applying the four-factor analysis of Cort v. Ash, 422 U.S. 66 (1975), which asks: (1) is plaintiff one of the class for whose especial benefit the statute was created?; (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?; (3) is it consistent with the underlying purposes of the legislative scheme to imply such remedy?; and (4) is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?

The implied private right of action analysis under Cort, although related, is distinctly different from the § 1983 analysis discussed supra. As the Supreme Court recently wrote:

> The [four factored Cort] test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because § 1983 provides an "alternative source of express congressional

> authorization of private suits," these separation of powers concerns are not present in a § 1983 case. Consistent with this view, we recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.

Wilder v. Virginia Hospital Association, 110 S.Ct. at 2517, n.9 (citations omitted).

While courts continue to apply Cort's four factors, it is the second factor, legislative intent, that is the primary focus in determining whether there is an implied private right of action.[17] Thompson v. Thompson, 484 U.S. 174, 179 (1988); Transamerica Mortage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979); Saltzman v. Farm Credit Services, 950 F.2d 466, 467-68 (7th Cir. 1991). Legislative intent may be found in the language or structure

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[17] Justice Scalia argues that the Supreme Court has "effectively overruled" the four-factor Cort analysis in Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979) and in Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979), thereby converting Cort's second factor (i.e. congressional intent) into "the determinative factor", with the other three merely indicative of the presence or absence of such intent. Thompson v. Thompson, 484 U.S. 174, 188-89 (1988) (Scalia, J., concurring) (emphasis in original).

of the statute or in some other source. Thompson v. Thompson, 484 U.S. at 179 (citing Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 94 (1981)). This inquiry requires "a very close, even mocroscopic, examination of the legislative history of the particular statute involved." Davis v. United Air Lines, 662 F.2d 120, 123 (2d Cir. 1981), cert. denied, 456 U.S. 965 (1982).

A party may show legislative intent without having to demonstrate that Congress simply forgot to create a private right of action:

> [o]ur focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an implied cause of action doctrine suggests, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." We therefore have recognized that Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment."

Thompson v. Thompson, 484 U.S. at 179 (citations omitted) (emphasis in original).

Courts should generally not find an implied private right of action in a given statute when Congress has expressly provided a different remedy. Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. 527, 533 (1989) ("It is . . . an "elemental canon" of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. In such cases, 'in the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.'" (quoting Middlesex County Sewerage Authority v. Sea Clammers, 453 U.S. 1, 15 (1981) (other citations omitted)). However, "[t]he fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." Cannon v. University of Chicago, 441 U.S. 677, 711 (1979).

### 2. The Existing Framework as Applied to 42 U.S.C. § 5310

In determining whether § 5310 creates an implied private right of action, it is the second Cort factor, legislative intent, which will be this Court's primary focus.[18]

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[18] For the reasons stated in Section C.2.b., supra, the Court finds that plaintiffs were one of the class for whose (continued...)

As discussed above, courts generally should not find an implied private right of action in a given statute when Congress has expressly provided a different remedy in that same part of the statute. Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. at 533. Thus, while there is "an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy," Wilder v. Virginia Hospital Association, 110 S.Ct. at 2517 n.9, the presumption in implied private right of action lawsuits is drawn in precisely the opposite direction: when Congress has expressly provided other remedies in connection with a particular section of a statute, no other remedies are to be implied "in the absence of strong indicia of contrary congressional intent." Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. at 533.

Congress has already created other tools for enforcement of § 5310. The Reorganization Plan provides for an administrative enforcement mechanism. This Court has found that laborers and mechanics have a § 1983 right of action. Because Congress has created these remedies and there is no strong indication that Congress intended to create additional remedies, this Court finds that no implied private right of action exists under § 5310.

## CONCLUSION

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[18] (...continued)
especial benefit § 5310 was created. Thus, the first prong of the Cort test favors plaintiffs in the instant action.

For the foregoing reasons, defendants' motions to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., are denied with respect to plaintiff's claims brought under 42 U.S.C. § 1983 and granted with respect to those claims brought pursuant to an asserted implied private right of action under 42 U.S.C. § 5310. In addition, that part of municipal defendants' motion brought pursuant to Rule 12(b)(1), Fed. R. Civ. P. is denied.[19] The magistrate

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[19] Municipal defendants paint a doomsday scenario if their motion is not granted and this Court finds a § 1983 remedy, asserting that this would "generate thousands of new cases for the already overburdened federal courts," that "[p]ublic contracting where Davis-Bacon was applicable would likely become impossible," and that "many municipalities would decline to accept HCDA money and, thus, . . . the purposes for which HCDA was designed would no longer be served." Memorandum of Law in Support of Municipal Defendant's Motion to Dismiss the Complaint at 122-23. While municipal defendants' dire predictions may or may not prove to be correct, it is not the function of this Court to play prognosticator, nor to deny a meritorious claim because it might invite other claims which would place a potentially heavy financial burden on municipalities. As discussed above, the Court finds that the elements necessary to establish a § 1983 right of action are present in § 5310. Furthermore, this decision relies on the specific language of § 5310, which differs, in important respects, from the language of the Davis-Bacon Act, as well as many of the other statutory provisions that refer to the wage-setting standards of the Davis-Bacon Act, such as 42 U.S.C.

(continued...)

judge's findings and recommendations are modified in accordance with this opinion.

Inasmuch as the Court declines the municipal defendants' request to certify this case for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the parties are directed to complete discovery by August 28, 1992 and to file a joint pre-trial order by September 25, 1992.

It is so ordered.

Dated: New York, New York
June 5, 1992

U.S.D.J.

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[19] (...continued)
§ 1437j and 33 U.S.C. § 1372. Thus this opinion is quite limited in its scope. Certainly if municipal defendants' parade of horribles does come to pass, Congress is free to prohibit a § 1983 right of action under § 5310 or any other statute.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 90 Civ. 5653 (RJW), DATED SEPTEMBER 8, 1992

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KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI XIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GUO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YUE NAM ZHU,

Plaintiffs,

- against -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNSEL, INC.,

Defendants.

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**OPINION**

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## APPEARANCES

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WARD, District Judge.

Defendants City of New York ("the City") and the Department of Housing Preservation and Development of the City of New York (collectively "municipal defendants") and Chinese-American Planning Counsel, Inc. ("CPC") have each moved, pursuant to Local Civil Rule 3(J), USDC, SDNY, for reargument of that portion of this Court's Opinion and Order dated June 5, 1992 (the "June 5, 1992 Opinion and Order") in which the Court "decline[d] the municipal defendants' request to certify this case for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)". Kam Shing Chan and the other plaintiffs (collectively "plaintiffs") oppose the instant motions. For the reasons that follow, the Court: (1) deems defendants' motions for reargument to be motions to modify the June 5, 1992 Opinion and Order; and (2) grants these motions, thereby certifying this case for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In all other respects, the Court adheres to its June 5, 1992 Opinion and Order.

## BACKGROUND

The relevant background to the underlying action is contained in the June 5, 1992 Opinion and Order at 3-6.

On June 3, 1992, approximately one month after oral argument on defendants' motions to dismiss and two days before the Court issued its opinion on those motions, municipal defendants submitted a short letter, containing little supporting authority, to the Court seeking certification of an interlocutory appeal pursuant to 28

U.S.C. § 1292(b). Prior to issuance of the June 5, 1992 Opinion and Order, no other party made any submissions on this subject to the Court. In its June 5, 1992 Opinion and Order, this Court declined to certify the case for interlocutory appeal, and the instant motions followed.

## DISCUSSION

### A. Defendants' Motions for Reargument

A party may move for reargument pursuant to Local Civil Rule 3(j) only upon an assertion that "the court has overlooked 'matters or controlling decisions' which, had they been considered, might reasonably have altered the result reached by the court." Adams v. United States, 686 F. Supp. 417, 418 (S.D.N.Y. 1988) (quoting Local Civil Rule 3(j), USDC, SDNY), quoted in Schonberger v. Serchuk, 742 F. Supp. 108, 119 (S.D.N.Y. 1990).

In addition, "a party making a motion for reargument may not, under [Local] Civil Rule 3(j), advance new facts, issues or arguments not previously presented to the Court." Schonberger v. Serchuk, 742 F. Supp. at 119.

In light of the fact that neither CPC nor plaintiffs briefed the § 1292(b) certification issue prior to issuance of the June 5, 1992 Opinion and Order, and that municipal defendants' letter seeking certification cited little authority in support of municipal defendants' position, it is clear that, in the context of the instant motions for reargument, each of which presents a great deal of

supporting authority, all parties are "advanc[ing] new facts, issues or arguments not previously presented to the Court." Accordingly, this Court would be compelled to deny defendants' motions for reargument pursuant to Local Civil Rule 3(j).

However, because the issues concerning § 1292(b) certification have only now been fully briefed, in the context of defendants' motions for reargument, it is appropriate to treat these issues as before the Court for the first time. For this reason, the Court deems the instant motions to be motions to modify the June 5, 1992 Opinion and Order. Accordingly, the Court now turns to the merits of the parties' arguments.

## B. Certification of an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)

Defendants seek an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which provides, in relevant part, that

> [w]hen a district judge, in making in a civil action an order not otherwise appealable under [section 1292], shall be of the opinion that such order [(1)] involves a controlling question of law [(2)] as to which there is substantial ground for difference of opinion and that [(3)] an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of

> Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

(emphasis added). The Second Circuit recently has "urged[d] the district courts to exercise great care in making a § 1292 (b) certification[, because] the district courts are presumed to be more familiar with a case than is the court of appeals prior to briefing and argument." Westwood Pharmaceuticals Inc. v. Nat'l Fuel Gas Distrib. Corp., 964 F.2d 85, 89 (2d Cir. 1992). Furthermore, only "exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978), quoted in Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990). With these general admonitions in mind, the Court now turns to the three-pronged test of § 1292(b) to ascertain whether the exceptional circumstances of this case suggest that certification is appropriate.

1. Is there a Controlling Question of Law?

There can be little doubt that the issues defendants seek to appeal, concerning whether plaintiffs have a right of action pursuant to 42 U.S.C. § 1983, "importantly affect the conduct of [this] action," see In re Duplan Corp., 591 F.2d 139, 148 n.11 (2d Cir. 1978) and the sources cited therein. As defendants have correctly noted, if the Court of Appeals determines that plaintiffs have no § 1983 right of action, this Court may be compelled to

dismiss plaintiff's other claims as well, either under a theory of preemption or because the only remaining claims would be pendent state claims. Thus, a ruling by the Court of Appeals in favor of defendants could result in dismissal of this lawsuit.

Plaintiffs assert that the precedential value of the June 5, 1992 Opinion and Order and any appellate review will be limited. The Court agrees with plaintiffs on this point. See June 5, 1992 Opinion and Order at 44-45, n.19. However, it is not necessary for the resolution of a question to be of great precedential value in order for that question to be "controlling." Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d at 24.

For these reasons, the Court finds that its June 5, 1992 Opinion and Order does involve a controlling question of law.

2. **Is there a Substantial Ground for Difference of Opinion?**

The issues addressed in the June 5, 1992 Opinion and Order involved matters that were both difficult and of first impression. See Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d at 25 (noting with approval the district court's conclusion that, when the issues before the district court on a motion for certification pursuant to 28 U.S.C. § 1292(b) were "difficult and of first impression," there were "substantial grounds for difference of opinion"). Although this Court found that there is a § 1983 right of action under 42 U.S.C. § 5310, the conclusions reached by

the Court were by no means the only reasonable conclusions an impartial arbiter could reach. The Court was presented with two close questions concerning whether Congress intended to (1) create a "right" under § 5310 and (2) foreclose § 1983 enforcement of § 5310. The Court obviously believes it answered these questions correctly. However, primarily because there was no explicit indication in the text of § 5310 or in its legislative history to guide an arbiter in answering these questions, the Court cannot say that there is no "substantial ground for difference of opinion." Accordingly, defendants have met the second prong of the § 1292 (b) test.

3. **Might an Immediate Appeal from the Order Materially Advance the Ultimate Termination of the Litigation?**

If defendants are successful on appeal and the Second Circuit dismisses the § 1983 claims, there is a substantial likelihood that the amount of discovery and corresponding district court time will be reduced dramatically, perhaps even entirely. Given the number of plaintiffs already involved in this litigation, and their pending motion for class certification, there is a significant amount of discovery to be conducted simply to determine the extent of each plaintiff's participation in CPC's training programs. The fact that plaintiffs seek class certification and that certain aspects of discovery involve translations from Chinese to English adds an additional level of complexity to this action. For these reasons, a successful appeal by defendants would materially advance the ultimate

termination of the litigation and would, in all likelihood, preserve scarce resources of the parties and the judiciary.

## CONCLUSION

Defendant's motions for reargument pursuant to Local Civil Rule 3(j), USDC, SDNY are deemed by this Court to be motions to modify the June 5, 1992 Opinion and Order. For the reasons stated supra, this Court finds that the June 5, 1992 Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the opinion and order may materially advance the ultimate termination of the instant litigation. Except to the extent indicated above, nothing in this opinion and order shall be construed to modify the June 5, 1992 Opinion and Order.

It is so ordered.

Dated: New York, New York
September 8, 1992

U.S.D.J.

No. 90 Civ. 5653 (RJW)

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 4, 1993 GRANTING CERTIFICATION PURSUANT TO F.R. Civ. P. 54(b)

KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI ZIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GUO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YUE NAM ZHU,

Plaintiffs,

- against -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Defendants.

Plaintiffs allege that defendant Chinese-American Planning Council, Inc. ("CPC") unlawfully failed to pay them wages at not less than prevailing wage rates as determined by the United States Secretary of Labor, and that defendants City of New York and Department of Housing Preservation and Development ("HPD") caused this failure. Plaintiffs assert causes of action under 42 U.S.C. § 1983, 42 U.S.C. § 5310, contracts between CPC and HPD, New York Labor Law § 198 and New York common Law.

All defendants moved pursuant to F.R. Civ. P. 12 to dismiss the federal statutory claims. By decision dated June 5, 1992, this Court granted the motions in part and denied them in part. The motions to dismiss the claims brought under § 5310 were granted; the motions to dismiss those claims asserted under § 1983 were denied. The Court held that § 5310 does not create an implied cause of action to remedy violations of that statute and, hence, that plaintiffs had failed to state a claim under § 5310 upon which relief might be granted. On the other hand, the Court held that § 1983 does provide plaintiffs with a cause of action to remedy the violations of § 5310 alleged and that the circumstances alleged, if proven, would establish action by CPC under color of state law.[1]

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[1] This Court has made no order with respect to the sufficiency of any of plaintiffs' causes of action other than their federal statutory claims, and no motions pertaining to these other claims are pending.

Defendants thereafter moved pursuant to 28 U.S.C. 1292(b) to certify for interlocutory appeal that part of the Court's order denying the motions to dismiss the § 1983 claims. By decision dated September 8, 1992, said motions were granted. Defendants then moved for leave from the Court of Appeals to take such interlocutory appeals. By orders dated November 10, 1992, the Court of Appeals granted said motions for permission to appeal.

Defendants have now requested that, pursuant to F.R. Civ. P. 54(b), this Court direct entry of a final judgment as to the claims brought directly under § 5310. Plaintiffs have expressly consented to such a final judgment.

After due consideration of the matter, this Court hereby directs entry of a final judgment as to plaintiffs' causes of action brought pursuant to § 5310. In the circumstances presented, there is no just reason for delaying the Court of Appeals' consideration of the § 5310 claims. To the contrary, the interests in sound judicial administration and efficiency will be served thereby.[2]

The questions (a) whether § 1983 expressly creates a cause of action to enforce § 5310 and (b) whether § 5310 implicitly creates a cause of action to enforce § 5310 are not the same. Nevertheless, the respective analyses necessary to resolve these two legal questions are related, at least in

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[2] This order is predicated on the assumption that entry of such a final judgment will not unduly delay consideration and disposition of the pending appeals on the § 1983 claims.

part, and parallel each other. It would be most sensible to enable the Court of Appeals to consider these questions at the same time. As noted, that Court has already accepted for interlocutory review defendants' appeal from that portion of the June 5 order denying the motions to dismiss the § 1983 claims. Entry of a final judgment as to that portion of the June 5 order granting the motions to dismiss the § 5310 causes of action will permit an immediate appeal from the latter order. Staff Counsel for the Court of Appeals has advised that an appeal on the § 5310 claims will be consolidated with the already pending appeal on the § 1983 claims and that the latter appeal will be delayed only approximately two weeks as a consequence. In these circumstances, the interests in efficiency and sound judicial administration strongly support entry of a final judgment as to that portion of the June 5 order granting the motions to dismiss the § 5310 claims.

Accordingly, it is so ordered.

DATED: NEW YORK, NEW YORK
January 4, 1993

U.S.D.J.

90 Civ. 5653 (RJW)

FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK ENTERED
JANUARY 11, 1993, DISMISSING IMPLIED RIGHT OF
ACTION CLAIMS

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KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI ZIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GUO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YUE NAM ZHU,

Plaintiffs

- against -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Defendants.

----------x

All defendants having moved pursuant to F.R. Civ.P. 12 to dismiss the federal statutory claims, and the said motions having come before the Honorable ROBERT J. WARD, U.S.D.J., thereafter the Court having granted in part and denied them in part by decision dated June 5, 1992, defendant having requested that, pursuant to F.R. Civ.P. 54(b), the Court directs entry of a final judgment as to the claims brought directly under Section 5310, and the Court thereafter on January 5, 1993, having handed down its certification pursuant to F.R.Civ.P. 54(b); directing entry of a final judgment as to plaintiff's causes of action brought pursuant to Section 5310, and in the circumstances presented, there is no just reason for delaying the Court of Appeals' consideration of the Section 5310 claims, and entering final judgment as to that portion of the June 5 order granting the motions to dismiss the Section 5310 claims, it is,

**ORDERED, ADJUDGED AND**

**DECREED:** That defendants' motions to dismiss the federal statutory claims be and they are hereby granted in part and denied in part, and it is further,

**ORDERED**, that plaintiffs' claims brought under 42 U.S.C. Section 5310 be and they are hereby dismissed pursuant to the Court's decision dated June 5, 1992.

DATED: NEW YORK, NEW YORK
January 11, 1993

_____
Clerk

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE FRANCIS, DATED JANUARY 6, 1992

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KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI XIANG LEE, YANG I, LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GAO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUOG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YE NAM ZHU,

Plaintiffs,

- against -

THE CITY OF NEW YORK, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Defendants.

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**REPORT AND RECOMMENDATION**

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TO THE HONORABLE ROBERT J. WARD, U.S.D.J.:

In this action, Kam Shing Chan and the other plaintiffs (collectively referred to as "Chan") seek to recover backwages that they claim are due them under 42 U.S.C. § 5310 and applicable contracts, together with liquidated damages and attorneys' fees, from defendants City of New York ("City"), the Department of Housing Preservation and Development of the City of New York ("HPD") (collectively, the "municipal defendants") and the Chinese-American Planning Council, Inc. ("CPC"). The defendants now move to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that § 5310 does not give rise either to a cause of action under 42 U.S.C. § 1983 nor to an implied private right of action. For the reasons that follow, I recommend that the motion be granted.

**Background & Statutory Scheme**

Plaintiffs are laborers that defendant CPC employed under a contract with the municipal defendants. The Housing and Community Development Act of 1974 ("HCDA"), 42 U.S.C. § 5301 et seq., supplied the federal funds for construction carried out under this contract. § 5310, which governed the plaintiffs' rate of payment, provides in relevant part:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance under this

> chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a--276-a-5 .... The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

Thus, § 5310, incorporates the wage standards of the Davis-Bacon Act (the "Act").

The Davis-Bacon Act has its origins in the Depression. See Universities Research Association v. Coutu, 450 U.S. 754, 773-74 (1981). It was meant to guarantee that federal construction projects would benefit local workers by paying them at the prevalent local rate rather than relying upon a workforce of lesser paid outsiders. Id. The provisions of the Miller Act of August 24, 1935, 40 U.S.C. Section 270a et seq. ("Miller Act"), add to the Davis-Bacon Act a procedure for ensuring that the local rate will be paid. Id. at 775-77. If wages paid fall short of those required by a contract containing Davis-Bacon Act stipulations, the difference will be paid at completion of the project out of a bond that the contractor is required to post with contracting federal agencies. If the bond is not large enough to make up this difference, the Miller Act further provides laborers and mechanics with a private right of action against the contractor for any backwages still due.

Subsequently Congress authorized the Secretary of Labor under the Reorganization Plan Numbered 14 of 1950 ("Reorganization Plan") to make reasonable regulations to ensure compliance with the Davis-Bacon Act and related statutes. See Universities Research Association v. Coutu, 450 U.S. at 759 & nn. 6-7; Janik Paving & Construction, Inc. v. Brock, 828 F.2d 84, 89 (2d Cir. 1987). The regulatory regime established under the Reorganization Plan allows contractors and laborers to challenge the setting and application of Davis-Bacon wage standards, 29 C.F.R. §§ 5.11, 5.13 7.1, and provides for contractors to be debarred for up to three years from eligibility for applicable contracts as a deterrent to the willful violation of labor standards in federal contracting. Id. at 91. Significantly, the Reorganization Plan does not provide for an action by laborers for backwages claimed under the Davis-Bacon standards.

Congress enacted the HCDA in 1974. Under the doctrine of the "new federalism," Congress sought to spur development by means of "block grants" to state and municipal governments, in contrast to Depression-era development programs administered through federal agencies. Congress wished to guarantee that contractors on federally funded projects under this new arrangement would continue to pay at the prevailing local rate, and so incorporated in § 5310 both the Davis-Bacon wage standards and the administrative scheme established to ensure compliance with them. However, HCDA did not provide the equivalent of the Miller Act provisions conferring a private right of action for backwages on laborers and

mechanics working under a contract containing Davis-Bacon wage stipulations.

Plaintiffs contend that CPC failed to pay wages at the level established by the Secretary of Labor under the Davis-Bacon Act and applicable to their employment under § 5310. They further allege that this failure constitutes state action under § 1983 because of the responsibility to oversee wage determinations placed on the municipal defendants under HCDA and because the municipal defendants conspired with CPC. Defendants respond that the regulations promulgated under the Reorganization Plan lodge in the Secretary of Labor exclusive authority for hearing disputes arising out of Davis-Bacon wage stipulations. Defendants argue that Congress has precluded either a § 1983 action under § 5310 or an implied private right of action by providing a detailed administrative scheme and by choosing to omit from § 5310 the equivalent of the private right of action for backwages supplied by the Miller Act. However, plaintiffs state that § 5310 does not provide an administrative means for recovery of backwages due under the Davis-Bacon standards and argue that an implied private right of action is therefore necessary to achieve the purposes of § 5310. To illustrate this, plaintiffs cite the response of the Secretary of Labor to their complaint that CPC underpaid them under the Davis-Bacon standards. The Secretary of Labor has determined that CPC owes its employees $2,005,791.16 in backwages and has requested a "restitution" of this amount. (See Dep't of Labor Letter of 2/5/91 to CPC Exec. Dir. Charles Pei Wang, attached as App. A to Def. CPC's Reply Br.)

## Discussion

### A. Standard for Dismissal

In considering a motion to dismiss, whether for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, or for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), the Court must accept the allegations of the complaint as true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see also Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1098 (2d Cir. 1988), cert. denied, 440 U.S. 1007 (1989). Furthermore, the Court should not dismiss the complaint pursuant to either Rule 12(b)(1) or Rule 12(b)(6) "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

### B. § 1983

The plaintiffs claim that the municipal defendants and CPC conspired to violate their rights under § 5310 and that § 1983 affords them a remedy. However, a plaintiff alleging a violation of a federal statute will not be permitted to sue under § 1983 if the statute "[does] not create enforceable rights, privileges, or immunities within the meaning of § 1983." Wilder v. Virginia Hosp. Ass'n, ___ U.S. ___, 110 S.Ct. 2510, 2517 (1990) (quoting Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423 (1987)). In Universities Research Association, Inc. v. Coutu, the Supreme Court determined

that the Davis-Bacon Act does not confer rights on laborers and mechanics, but rather imposes a duty on federal agencies to ensure that the provisions required by the Davis-Bacon Act are included in federal contracts to which the Act applies. 450 U.S. at 772 & n.23 (1981).

Although plaintiffs distinguish between § 5310 and the Davis-Bacon Act, there is no reason why the Coutu analysis should not be followed here. Surely it would be anomalous if in incorporating the Davis-Bacon standards into the HCDA, Congress conferred rights upon laborers and mechanics employed under § 5310 that it withheld in enacting the Davis-Bacon Act. The language and legislative history of § 5310 reveal a legislative intent to impose on federal agencies the duty of ensuring that contracts include the Davis-Bacon wage stipulations and to provide the means to enforcement available under the Reorganization Plan regulatory regime. Significantly, the Reorganization Plan allows laborers and mechanics to challenge the determination and application of Davis-Bacon wage standards and provides debarment from contracts as a deterrent from willful violation of Davis-Bacon wage standards. See, e.g., Janik Paving and Construction, Inc., 828 F.2d at 91. In contrast, where Congress has chosen to confer rights, as well as impose duties on federal agencies, it has so provided. See, e.g., id. at 86 (provision of contractor liability for direct payment to affected employees, in addition to Reorganization Act debarment proceedings, for willful violation of Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-333).

However, even if § 5310 created a right, § 1983 requires that the conduct complained of be committed by a "person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Plaintiffs allege that defendant CPC acted under the color of state law in denying them the salary levels required under § 5310. However, CPC's relationship with the state actors -- the City and HPD -- was contractual. There is no indication of the joint participation demonstrating a "close nexus" between the private and public parties that must be present to give rise to state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). As in Hadges v. Yonkers Racing Corp., 918 F.2d 1079 (2d Cir. 1990), where there was "no evidence that a State Official participated in [the private party's] decision to deny [the plaintiff's] application [for employment]," the municipal defendants' link to the rate at which the plaintiffs were paid is "too tenuous" to constitute state action, 918 F.2d at 1083, since no state official participated in CPC's wage determinations. In addition, plaintiffs claim that project funding levels established by the City caused them to be underpaid and that under Department of Housing and Urban Development guidelines, the municipal defendants had supervisory responsibilities over the CPC's wage levels; see handbook attached as Ex. A to Aff. of James Reif of 1/23/91. However, neither extensive state regulation, Jackson, 419 U.S. at 350, nor funding, Blum v. Yaretsky, 457 U.S. 991, 1011 (1982), gives rise to state action by a private party.

The plaintiffs further allege that CPC conspired with the municipal defendants to deprive them of

the salary levels due under § 5310 and that CPC is consequently a state actor. However, "conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss." Zemsky v. City of New York, 821 F.2d 148, 151 (2d Cir.) (quoting Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.) (per curiam), cert. denied, 464 U.S. 857 (1983)), cert denied, 484 U.S. 965 (1987). Here the plaintiffs do not identify the individuals who entered into the purported conspiracy, when it began, nor how long it continued. Thus, the plaintiffs have also failed in their attempt to characterize their loss of wages as the result of CPC's conspiracy with a state actor.

C. Private Right of Action

Plaintiffs also claim that they are afforded a private right of action for the backwages stipulated by § 5310. Again plaintiffs insist on a distinction between the Davis-Bacon Act and § 5310; they argue that the Davis-Bacon Act creates an implied private right of action and also claim that decisions to the contrary are not applicable to § 5310. However, the incorporation of the Davis-Bacon provisions into § 5310 is more significant than plaintiffs recognize. In enacting § 5310, Congress expressly incorporated both the Davis-Bacon wage standards and the Davis-Bacon enforcement provisions but chose not to provide any equivalent of the Miller Act provision of a private right of action under the Davis-Bacon Act. Thus § 5310 and the Davis-Bacon Act are identical in all essentials but one, and that one supports a finding that

Congress did not intend to create a private right of action under § 5310.

Whether or not Congress intended a statute to create a right that is enforceable by a private cause of action is analyzed according to three factors: "[1] Was the plaintiff `one of the class for whose especial benefit the statute was enacted'...? [2] is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?...[3] is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted).

In Coutu the Supreme Court gave negative answers to the first and second Cort questions. First, the Court found that while the Davis-Bacon Act did benefit laborers and mechanics employed under a contract subject to the Davis-Bacon standards, it did not "confer rights directly" on them, but rather benefitted them as an indirect effect of the duty that it imposed on federal agencies contracting under the Davis-Bacon Act. Universities Research Association v. Coutu, 450 U.S. at 772 & n.23. Therefore, the Court concluded, the Davis-Bacon Act was not enacted for the especial benefit of mechanics and laborers. Id. Next, the Court examined the significance of the Miller Act provision of an express private right of action as an indication of legislative intent. Coutu presented the question of whether a cause of action could be inferred on behalf of an employee engaged in government work whose contract did not contain a Davis-Bacon wage standard provision. The Court observed that the inclusion of the Miller Act procedure in the Davis-Bacon Act "demonstrates

that... `when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.'" Universities Research Association v. Coutu, 450 U.S. at 773 (quoting Touche Ross, 442 U.S. at 572). Thus the provision of an express private right of action supported an inference that Congress did not intend to create an additional implied private right of action. The negative inference is at least as warranted in the instant case. Here Congress did provide that the plaintiffs' contracts would be subject to Davis-Bacon wage standards but nevertheless chose not [sic] provide an express private action equivalent to that under the Miller Act. As in Coutu, where Congress chose not to provide an express private right of action, it would be illogical to conclude that it intended to create an implied private right of action.

In sum, there is conclusive evidence of Congress's intent not to create an implied right of action under § 5310, and this evidence is bolstered by the determination that § 5310 does not confer rights directly on those in plaintiffs' position. It may be correct, as plaintiffs claim, that implication of a private cause of action would be consistent with the underlying purpose of § 5310, as the third Cort factor requires. However, each of the Cort factors is not necessarily "entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." Transamerica Mortgage Advisors. Inc. v. Lewis, 444 U.S. 11, 23-24 (1979); see also CETA Workers Organizing Committee v. New York, 617 F.2d 926, 932 n.2 (1980). As the Supreme Court stated in Coutu, "[T]he question whether a statute creates a private right of action is

ultimately `one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.'" Universities Research Association, Inc. v. Coutu, 450 U.S. at 770 (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)). Since Congress considered that the purposes of § 5310 were sufficiently served without a private remedy, it is clear that § 5310 does not provide an implied private cause of action.

Conclusion

For the reasons set forth above, I recommend that the motion to dismiss be granted. Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Robert J. Ward, room 2204, and to the chambers of the undersigned, Room 633.

Respectfully submitted

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE
JUDGE

Dated: New York, New York
January 6, 1992

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## STATUTORY PROVISIONS

**42 U.S.C. § 1983 provides:**

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**Section 5310 of Title I of the Housing Community and Development Act, 42 U.S.C. § 5310 provides, in pertinent part:**

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar

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construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. § 276a-276a-5): Provided, that this section shall apply to the rehabilitation of residential property only if such property contains not less than 8 units. The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan No. 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

**The Davis-Bacon Act, 40 U.S.C. § 276(a) et seq., provides in pertinent part:**

(a) The advertised specifications for every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the State of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work

in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there;....

**Reorganization Plan No. 14 of 1950, 5 U.S.C. App., 64 Stat. 1267, provides:**

In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable, namely: (a) The Act of March 3, 1931 (46 Stat. 1494, ch. 411), as amended; (b) the Act of June 13, 1934 (48 Stat. 948, ch. 482); (c) the Act of August 1, 1892 (27 Stat. 340, ch. 352), as amended; (d) the Act of June 19, 1912 (37 Stat. 137, ch. 174), as amended; (e) the Act of June 3, 1939 (53 Stat. 804, ch. 175), as amended; (f) the Act of August 13, 1946 (60 Stat. 1040, ch. 958); (g) the Act of May 13, 1946 (60 Stat. 170, ch. 251), as amended; and (h) the Act of July 15, 1949, ch. 338, Public Law 171, 81st Congress, First Session.

**The Elementary and Secondary Education Act of 1969, 20 U.S.C. §1232b, provides:**

> Except for emergency relief under section 241-1 of this title, all laborers and mechanics employed by contractors or subcontractors on all construction and minor remodeling projects assisted under any applicable program shall be paid wages at rates not less than those prevailing on similar construction and minor remodeling in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended [40 U.S.C.A. §276a et seq.]. The Secretary of Labor shall have, with respect to the labor standards specified in this section, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

**The Headstart Economic, Opportunity and Community Partnership Act of 1974, 42 U.S.C. §2992a, provides:**

> All laborers and mechanisms employed by contractors or subcontractors in the construction, alteration, or repair, including painting or decorating, of buildings or other facilities in connection with projects assisted under this subchapter, shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in

accordance with the Davis-Bacon Act [40 U.S.C.A. §276a et. seq.]. The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40.

**Section 6881(h) of the Energy Conservation and Production Act, 42 U.S.C. §6881(h) provides:**

> All laborers and mechanics employed in construction, alteration, or repair which is financed by an obligation guaranteed under subsection (a) of this section shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act [40 U.S.C.A. §276a et seq.]. The Secretary shall not guarantee any obligations under subsection (a) of this section without first obtaining adequate assurance that these labor standards will be maintained during such construction, alteration, or repair. The Secretary of Labor shall, with respect to the labor standards in this subsection, have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

**The Commercial Fisheries Research and Development Act of 1964, 16 U.S.C. §779(e)(b) provides:**

> All laborers and mechanics employed by contractors or subcontractors on all construction projects assisted under this chapter shall be paid wages at rates no less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended [40 U.S.C.A. §276a et seq.], and shall receive overtime pay in accordance with and subject to the provisions of the Contract Work Hours Standards Act [40 U.S.C.A. §327 et seq.]. The Secretary of Labor shall have with respect to the labor standards specified in this section the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

**The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450e(a), provides, in pertinent part:**

> (a) All laborers and mechanics employed by contractors of [sic] subcontractors in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the

locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended [40 U.S.C.A. §276a et seq.]. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 [sic] is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40.

**Section 5046 of the Domestic Volunteer Services Act of 1973, 42 U.S.C. §4950, et seq. provides:**

All laborers and mechanics employed by contractors or subcontractors in the construction, alteration, or repair, including painting and decorating of projects, buildings and works which are federally assisted under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a--276a-5). The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and in section 276c of Title 40.

**The Emergency Community Facilities Act of 1970, 42 U.S.C. § 3107 provides:**

> All laborers and mechanics employed by contractors or subcontractors on projects assisted under sections 3102 and 3103 of this title shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. No such project shall be approved without first obtaining adequate assurance that these labor standards will be maintained upon the construction work. The Secretary of Labor shall have, with respect to the labor standards specified in this section, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40.

**Section 8775 of the Energy Security Act, 42 U.S.C. §8701, et seq., provides:**

> The provisions of the Act entitled "An Act Relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (40 U.S.C. 276a et seq.) and commonly known as the Davis-Bacon Act, and the provisions of the Service

Contracts Act [41 U.S.C.A §351 et seq.] shall apply to the [United States Synthetic Fuels] Corporation as if it were an agency of the United States. All laborers and mechanics employed for the construction, repair, or alteration of synthetic fuel projects funded, in whole or in part, by the Corporation pursuant to section 8732, 8733, or 8736 of this title shall be paid wages at rates not less than those prevailing on projects of a similar character in the locality as determined by the Secretary of Labor in accordance with the Act commonly known as the Davis-Bacon Act [40 U.S.C.A. §276a et seq.]. The Corporation shall not extend any loan or loan guarantee for construction, repair or alteration of a synthetic fuel project unless a certification is provided to the Corporation prior to the commencement of construction, or at the time of filing an application for a loan or loan guarantee if construction has already commenced, that these labor standards will be maintained at the synthetic fuel project. The Secretary of Labor shall have, with respect to the labor standards specified in this subsection, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

**The National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. §954(n), provides:**

> It shall be a condition of the receipt of any grant under this section that the group or individual of exceptional talent or the State or State agency receiving such grant furnish adequate assurances to the Secretary of Labor that all laborers and mechanics employed by contractors or subcontractors on construction projects assisted under this section shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended [40 U.S.C.A. §276a et seq.]. The Secretary of Labor shall have with respect to the labor standards specified in this subsection the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

**The Older Americans Acts of 1965, 42 U.S.C. §3027(a)(14)(D) provides:**

> The plan shall provide, with respect to the acquisition (in fee simple or by lease for 10 years or more), alteration, or renovation of existing facilities (or the construction of new facilities in any area in which there are no suitable structures available, as determined by the State agency, after full

consideration of the recommendations made by area agencies on aging, to be a focal point for the delivery of services assisted under this subchapter) to serve as multipurpose senior centers, that--

* * *

(D) the plan contains or is supported by adequate assurance that any laborer or mechanic employed by any contractor or subcontractor in the performance of work on the facility will be paid wages at rates not less than those prevailing for similar work in the locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (40 U.S.C.A. §§276a--276a-5; commonly known as the Davis-Bacon Act), and the Secretary of Labor shall have, with respect to the labor standards specified in this subparagraph, the authority and functions set forth in reorganization plan numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267), and section 276c of Title 40; and

**The Solid Waste Disposal Act, 42 U.S.C. §6979 provides:**

No grant for a project of construction under this chapter shall be made unless the Administrator finds that the application contains or is supported by reasonable assurance that all laborers and mechanics employed by contractors or subcontractors on

projects of the type covered by the Davis-Bacon Act, as amended (40 U.S.C. 276a--276a-5), will be paid wages at rates not less than those prevailing on similar work in the locality as determined by the Secretary of Labor in accordance with that Act; and the Secretary of Labor shall have with respect to the labor standards specified in this section the authority and functions set forth in Reorganization Plan Numbered 14

**The Hospital Survey and Construction Act, 42 U.S.C. §291, et. seq. provides:**

For each project pursuant to a State plan approved under this part, there shall be submitted to the Surgeon General, through the State agency, an application by the State or a political subdivision thereof or by a public or other nonprofit agency. If two or more such agencies join in the project, the application may be filed by one or more of such agencies. Such application shall set forth--

* * *

(5) reasonable assurance that all laborers and mechanics employed by contractors or subcontractors in the performance of construction or modernization on the project will be paid wages at rates not less than those prevailing on similar work in the locality as determined by the Secretary of

Labor in accordance with the Davis-Bacon Act, as amended [40 U.S.C. 276a et seq.]; and the Secretary of Labor shall have with respect to the labor standards specified in this paragraph the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176) and section 276c of Title 40; and

**29 C.F.R. § 1.10 (1974) provides:**

§ 1.10 **Hearings.**

Whenever he deems it necessary because of insufficiency of information or impracticality of a field survey, or both, the Administrator may direct a hearing to be held. He shall request the Chief Hearing Examiner, U.S. Department of Labor, to designate a hearing examiner who shall, after notice to all interested persons, proceed to the project area and make such investigations and conduct such hearings as may be necessary to make a determination of wage rates for the project.

29 C.F.R. §§ 1.13 1-1.16 (1974) provides:

**§ 1.13 Submission of hearing examiner's proposed decision to interested persons.**

A copy of the hearing examiner's proposed decision shall be mailed to each interested person appearing at the hearing.

**§ 1.14 Exceptions of interested persons.**

Any intered person may within 5 days after receipt of the hearing examiner's proposed decision file his exceptions thereto. Such exceptions shall be filed with the Chief Hearing Examiner, U.S. Department of Labor, Washington 25, D.C. for transmission to the Administrator.

**§ 1.15 Decision of Administrator.**

The Administrator shall rule upon any exceptions filed under § 1.14, and shall make a determination as to the prevailing wage rates for the project.

**§ 1.16 Review by Wage Appeals Board.**

Any interested person may appeal to the Wage Appeals Board for a review of a determination of wage rates made under this part, or

any findings and conclusions made on the record of any hearings held under § 1.3(c). Any such appeal may, in the discretion of the Wage Appeals Board, be received, accepted, and decided in accordance with the provisions of 29 CFR Part 7 and such other procedures as the Board may establish.

**29 C.F.R. § 5.6(a)(1)(1974) provides:**

(a)(1) It shall be the responsibility of the Federal agency to ascertain whether the clauses required by § 5.5 have been inserted in the contracts. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require that § 5.5 or such modifications thereof which have been approved by the Department of Labor. No payment, advance, grant, loan or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that he and his subcontractors have complied or that there is a substantial dispute with respect to the required provisions.

**29 C.F.R. § 5.6(a)(3)(1974) provides (emphasis added):**

> (3) In addition to the examination of payrolls and statements required by subparagraph (2) of this paragraph, the Federal agency shall cause investigations to be made as may be necessary to assure compliance with the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1. Projects where the contact is of short duration (6 months or less) shall be investigated before the work is accepted, if feasible. In the case of contracts which extend over a long period of time the investigation shall be made with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees and examinations of payroll data to determine the correctness of classifications and disproportionate employment of laborers, helpers, or apprentices. Complaints of alleged violations shall be given priority and statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to his employer without the consent of the employee.

**29 C.F.R. § 5.6(b)(1)(1974) provides in pertinent part:**

> (b)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor or the Agency Head with the concurrence of the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts subject to any of the statutes listed in § 5.1.

**29 C.F.R. § 5.7(d)(1974) provides:**

> (d) Contract termination. Where the contract is terminated by reason of violations of the labor standards a report shall be submitted to the Secretary of Labor and the Comptroller General giving the name and address of the contractor or subcontractor whose right to proceed has

been terminated, the name and address of the contractor or subcontractor, if any, who is to complete the work, the amount and number of his contract, and the description of the work he is to perform.

**29 C.R.F. § 5.9 (1974) provides:**

> In the event of failure or refusal of the contractor or any subcontractor to comply with labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in § 5.1, the Federal agency shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled and to cover any liquidated damages which may be due.

**29 C.F.R. § 5.10 (1974) provides:**

> (a) The Agency head may, in appropriate cases where violations of the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1 resulting in

underpayment of wages to employees are found to be nonwillful, request that restitution be made to such employees or on their behalf to plans, funds, or programs for any type of fringe benefit prescribed in the applicable wage determination.

(b) In cases where the Agency Head finds substantial evidence that such violations are willful and in violation of a criminal statute, the Agency Head shall forward the matter to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Secretary of labor shall be informed of the action taken.

**29 C.F.R. § 5.11 (1974) provides in pertinent part (1974):**

(a) The Secretary of Labor shall cause to be made such investigations as he deems necessary, in order to obtain compliance with the labor standards provisions of the applicable statutes listed in § 5.1, or to affirm or reject the recommendations by the Head of an agency for an appropriate adjustment inliquidated damages assessed under the Contract Work Hours and Safety Standards Act.

* * *

(b) In the event of disputes concerning the payment of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations, the Secretary of Labor may, upon request by a Federal agency, direct a hearing to be held. For the purpose of the hearing the Secretary of Labor shall, in writing, designate a hearing examiner who shall, after notice to all interested parties, make such investigation and conduct such hearings as may be necessary and render a decision embodying his findings and conclusions and if wages are found to be due, the amounts thereof. The hearing examiner's decision shall be sent to the interested parties and shall be final unless a petition for review of the decision by the Solicitor of Labor is filed by any such parties in quadruplicate with the Chief Hearing Examiner, United States Department of Labor, Washington 25, D.C., within 20 days after receipt thereof. The petition for review must set out separately and particularly each objection asserted. The petition for review and the record which shall include the examiner's decision then shall be certified by the hearing examiner to

the Solicitor of Labor. The petitioner may file a brief (original and four copies) in support of his petition within the 20-day period and any interested party upon whom the hearing examiner's decision has been served may within 10 days after the expiration of the time for filing the petition for review, file a brief in support of, or in opposition to the hearing examiner's decision. The Solicitor of Labor's decision shall be subject to such further review by the Wage Appeals Board, as it may provide in its discretion.

**29 C.F.R. § 5.12 (1974) provides:**

All questions arising in any agency relating to the application and interpretation of the rules contained in this part and in Parts 1 and 3 of this subtitle, and of the labor standards provisions of any of the statutes listed in § 5.1 shall be referred to the Secretary for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be addressed to the

Secretary of Labor, United States Department of Labor, Washington 25, D.C.

Supreme Court, U.S.
FILED
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Nos. 93-534 and 93-535

In The

# Supreme Court of the United States

October Term, 1993

CITY OF NEW YORK; DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY,

*Petitioners,*

-against-

KAM SHING CHAN, et al.,

*Respondents.*

CHINESE-AMERICAN PLANNING COUNCIL, INC.,

*Petitioner,*

-against-

KAM SHING CHAN, et al.,

*Respondents.*

**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 5310 secures to laborers and mechanics employed on federally financed construction work a right within the meaning of 42 U.S.C. § 1983 to be paid wages at not less than prevailing wage rates determined by the United States Secretary of Labor?

2. Whether petitioners have demonstrated that Congress intended to preclude resort to § 1983 to remedy violations of § 5310, where the relevant construction contracts require payment of wages at not less than federal prevailing wage rates?

3. Whether, in imposing a cap on funding of construction contracts so low as to render impossible compliance with § 5310 and in prohibiting additional funding thereof, municipal petitioners

may have coerced or so significantly encouraged the employer petitioner's violations of § 5310 that said violations were committed under color of state law within the meaning of § 1983?

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## BRIEF IN OPPOSITION

Respondents Kam Shing Chan, et al., submit this brief in opposition to the petitions in Nos. 93-53[1] and 93-535 for writs of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which, on interlocutory appeal, affirmed denial of petitioners' motions to dismiss claims under 42 U.S.C. § 1983 to enforce rights secured by 42 U.S.C. § 5310.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 1 F.3d 96 and is reprinted in petitioners' appendix at A1.[1] The

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[1] Citations to the appendix filed in this Court by petitioners are indicated by a parenthesis containing an "A" followed by the page number(s). Citations to the Joint Appendix filed below are indicated by a parenthesis containing the page number(s).

opinions of the United States District Court for the Southern District of New York are reported at 803 F. Supp. 710 and appear at A26 and A79. The opinion of the magistrate judge is not reported and is reprinted at A96.

## STATUTES AND REGULATIONS INVOLVED

This case concerns the proper interpretation of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983, and Section 110 of the Housing and Community Development Act of 1974, 88 Stat. 649, as amended, 42 U.S.C. § 5310(a), which are reprinted at A109 and A109-110, respectively. This case also involves Reorganization Plan No. 14 of 1950, 15 F.R. 3176, 64 Stat. 1267, 5 U.S.C. App., and the Message of the President, 5 U.S.C. App., transmitted to

Congress with the Plan. Reorganization Plan No. 14 is reprinted at A111. The Message of the President appears in the appendix to this brief. Finally, this case concerns 29 C.F.R. § 5.11(a) (1992), also reprinted in the appendix hereto.

## STATEMENT OF THE CASE

### Statement of Facts

Plaintiffs-respondents were laborers and mechanics employed by defendant-petitioner Chinese-American Planning Council, Inc. ("CPC") in the performance of construction work financed with federal assistance received by defendant-petitioner City of New York ("City") under Title I of the Housing and Community Development Act of 1974 ("HCDA"), 88 Stat. 633, as amended, 42 U.S.C. § 5301 et seq. CPC and the City,

acting through its Department of Housing Preservation & Development ("HPD"), entered into three contracts covering September, 1986 through December, 1989, under which CPC was to repair and rehabilitate City-owned housing.

Each of the contracts contained the following clause:

> The Contractor acknowledges that this Agreement is funded under a program providing direct financial assistance from the Federal government to the City and HPD and is subject to, and the Contractor shall comply with, the requirements of all applicable Federal Statutes, rules and regulations, including, but not limited to, those set forth in Exhibit F attached to this Agreement.

(89, 939r, 337) (emphasis added).

Exhibit F identified Title I as one of the "applicable Federal Statutes," stating: "This contract is subject to: Title I of the Housing and Community Development Act of 1974 {(P.L. 93-383)],

as amended ..." (120, 939ww, 373).

Title I included Section 110 of the HCDA which, as amended and codified at 42 U.S.C. § 5310(a), provides:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a--276a-5) .... The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan No. 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

Exhibit F also provided in pertinent part that

> all laborers and mechanics must be paid at a rate not less than those determined by the Secretary of Labor to be prevailing for the locality, which rates are annexed hereto as Exhibit A. These wage rates are a federally mandated <u>minimum</u> ...

(129, 939fff, 382) (emphasis in original). Each contract contained still another clause of identical import:

> All laborers and mechanics employed upon the work covered by this Contract shall be paid ... at wage rates not less than those contained in the wage determination decision of [the] Secretary of Labor (a copy of which is attached and herein incorporated by reference).

(A137, 939nnn, 390). Attached to each contract were prevailing wage rates determined by the Secretary of Labor. (155, 939gggg, 409).

The 35 respondents are construction workers most of whom emigrated from China or Hong Kong. They were hired by CPC as mason tenders, painters, carpenters, and drywall tapers and repaired and rehabilitated City housing pursuant to the CPC-HPD contracts. (767). Notwithstanding the obligations imposed by § 5310 and the aforesaid contract

provisions, CPC failed to pay respondents at federal prevailing wage rates for any of their work.

**Proceedings in District Court**

Respondents seek to recover the difference between what they were paid and what they were entitled to be paid. They asserted claims under 42 U.S.C. §§ 1983 and 5310, the CPC-HPD contracts and New York tort law. Petitioners moved to dismiss the federal statutory claims. The District Court (Hon. Robert J. Ward) denied dismissal of respondents' § 1983 claims, but granted dismissal of the causes of action asserted directly under § 5310. (A26-78).

In determining that § 5310 secures a § 1983 right, the Court applied the "framework" set out in Wilder v. Virginia

Hospital Ass'n, 496 U.S. 498 (1990), "with the modifications suggested by" Suter v. Artist M., ___ U.S. ___, 112 S. Ct. 1360 (1992). (A50). The Court held that § 5310 imposes a binding obligation to pay wages at not less than federal prevailing wage rates ("prevailing wages"), that § 5310 was intended to benefit respondents directly, and that it is clearly susceptible of judicial enforcement. (A60-61).

Judge Ward carefully distinguished the substantive duty to pay prevailing wages imposed on a contractor by § 5310 from the procedural requirement imposed on a federal agency by, e.g., the Davis-Bacon Act, 40 U.S.C. § 276a(a), to include prevailing wage rate provisions in construction contracts. (A55, 56-57). Because § 5310 unambiguously creates the

substantive obligation, not the procedural one, it satisfies Suter. (A61).

The District Court also held petitioners failed to demonstrate that Congress foreclosed resort to § 1983 to enforce the right secured by § 5310. Congress has not explicitly foreclosed § 1983 enforcement of § 5310 (A65). The Court therefore examined whether § 5310 creates a remedial scheme sufficiently comprehensive to demonstrate congressional intent to preclude a § 1983 remedy for violations of § 5310. (A62). In particular, Judge Ward considered whether the statutory framework is such that allowing respondents to pursue their § 1983 claims would be inconsistent with the congressional scheme. (A62-63).

That scheme balances a worker's right

to prevailing wages with a contractor's interest in knowing in advance his approximate labor costs. The contract clauses quoted above clearly apprised CPC of its obligation to pay wages at prevailing rates. And the predetermination of those rates by the Secretary of Labor provided CPC with even more precise notice of its labor costs. For these reasons, the Court found that respondents' § 1983 action, which merely sought enforcement of the Secretary's determinations, would not undermine CPC's interest in knowing in advance its approximate labor costs. (A66-67).

The Court further noted: "Unlike the comprehensive enforcement schemes in Sea Clammers and Smith v. Robinson, neither § 5310 nor the Reorganization Plan contains provisions for private judicial

remedies." (A69). Even the regulation which establishes an administrative procedure for resolution of disputes concerning payment of prevailing wages, 29 C.F.R. § 5.11(a)(1992), does not allow an employee to initiate an administrative proceeding. (A69-70). The Court also found that efforts to amend the Davis-Bacon Act were not probative of an intent to foreclose reliance on § 1983 to remedy violations of § 5310, in light of the "fundamental differences" between Davis-Bacon and § 5310. (A70-71). Finally, "there is absolutely no evidence in the legislative history of the HCDA itself that Congress sought to foreclose a § 1983 remedy under § 5310." (Id.)

The District Court also held respondents have presented sufficient facts from which it may be found that

CPC's challenged conduct was undertaken under color of state law within the meaning of § 1983. Quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), the Court held that private action is properly deemed state action when there is a sufficiently close nexus such that the private party's action may be fairly treated as that of the State. (A43). The facts alleged permit a finding that the municipal petitioners had exercised coercive power or provided such significant encouragement that CPC's failure to pay prevailing wages must be deemed to be that of the City: "as a condition for awarding the contract," the City imposed a cap on the funding of the construction contract that

> was so low as to make it financially impossible for CPC to pay prevailing wage rates as required under 42 U.S.C. § 5310.

> In short, plaintiffs have alleged facts asserting that the municipal defendants ensured that any successful bidder would be forced, for economic reasons, to violate 42 U.S.C. § 5310. If proven true, these facts would be sufficient to demonstrate that the municipal defendants "exercised coercive power or ... provided such significant encouragement" as to establish 42 U.S.C. § 1983 state action under the close nexus test.

(A47) (footnote omitted).

**Court of Appeals Opinion**

The District Court certified for interlocutory appeal so much of its order as denied the motions to dismiss respondents' § 1983 claims. (A79-88). The Court of Appeals granted petitioners permission to take such appeals. (A25).

A panel of the Second Circuit, composed of Judges Amalya Kearse, Richard Cardamone and Ellen Bree Burns (the latter sitting by designation),

unanimously affirmed the denial of petitioners' motions to dismiss the § 1983 claims. After reviewing Judge Ward's analysis (A7-9), the Court of Appeals, in an opinion by Judge Kearse, rejected petitioners' appeals "substantially for the reasons stated by the district court." (A11). The Circuit applied this Court's decisions defining a § 1983 "right". (A15-17).

> In the present case, we conclude that under the Wilder analysis or, to the extent that it differs, the Suter analysis, § 5310 provides these plaintiffs with a right that is sufficiently clear to be enforceable under § 1983 ....

(A17). The Court of Appeals held that respondents are among the intended beneficiaries of § 5310, that § 5310 is cast in mandatory terms and imposes an unambiguous obligation on CPC to pay prevailing wages, that the obligation is

substantive and does not merely require inclusion of a provision in a plan or contract, and that § 5310 is capable of judicial enforcement. (A17-18).

Like Judge Ward (A72-73), the Court of Appeals also noted that the fact that a statute conferring substantive rights may not itself create a private cause of action does not mean that the statute's beneficiaries are without a private judicial remedy. (A14, 15). The Court held that the scheme for enforcement of § 5310 is not "sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under § 1983." (A18). The HCDA contains no provision for private judicial remedies. (A19). Even the regulatory scheme fashioned by the Secretary of Labor under Reorganization Plan No. 14, in effect

adopted by § 5310, "does not make provision for laborers to enforce their rights administratively." (A19).

The Circuit also agreed that the facts alleged and supported by the CPC-HPD contracts support a finding that the municipal petitioners "effectively required" CPC to pay less than the minimum wages mandated by § 5310:

> CPC was required to make its bids on wages below [the federally mandated] levels; it was paid a sum that did not give it sufficient funds to pay wages at the § 5310 required minimum levels; and it was prohibited by the Contracts from receiving any additional funding for the work performed thereunder.

(Id.). These facts permit a finding that HPD exercised coercive power over and provided significant encouragement to CPC so as to render CPC's challenged conduct "under color" of state law. (A22-23). The Court rejected the argument that the

municipal defendants acted under color of federal, rather than state, law. The City's actions which caused CPC to violate § 5310 "were not required by any federal provision." (A24).

**REASONS FOR DENYING CERTIORARI**

In affirming denial by the District Court of motions to dismiss respondents' § 1983 claims, the Second Circuit held: (a) § 5310 secures to respondents the right to be paid for federally-financed construction work at not less than prevailing wage rates determined by the Secretary of Labor; (b) there is no indication that Congress intended to preclude resort to § 1983 to enforce § 5310 rights where, as here, the relevant contracts expressly required payment of respondents at not less than

such prevailing wage rates; (c) the circumstances presented "easily permit the inference" that the municipal petitioners coerced and substantially encouraged the employer petitioner's violations of § 5310, thus rendering those violations under color of state law for purposes of § 1983. The opinion of the Court of Appeals, like that of the District Court, carefully and correctly followed the applicable decisions of this Court, including Suter, supra.

The decision of the Court of Appeals is not "in conflict with the decision of another United States court of appeals on the same matter." Compare Sup. Ct. R. 10.1(a). Indeed, in the almost twenty years since enactment of § 5310, there has not been a single other case in which § 1983 has even been invoked by a

plaintiff seeking to enforce § 5310 (or any other similarly-worded statute). This is as true for the period since the June 5, 1992 decision of the District Court as for the period prior thereto.

Reliance upon § 1983 is made possible here only because of the unprecedented circumstances demonstrating that CPC's failure to pay prevailing wages was coerced and substantially encouraged by local governmental authorities. The uniqueness of private contractor liability under § 1983 deprives this case of general importance to enforcement of § 5310 or other prevailing wage laws.

Contrary to petitioners' contention, post-Suter litigation does not evidence confusion by the federal courts as to the criteria for determining the availability of § 1983 to remedy violations of federal

statutes. A reading of post-Suter decisions shows lower courts have uniformly and correctly adhered to the criteria set forth in Suter and other precedents of this Court. In sum, the petitions do not present circumstances warranting review by this Court of the judgment below.

I.

**CONSISTENT WITH THIS COURT'S PRECEDENTS, INCLUDING SUTER v. ARTIST M., THE COURTS BELOW CORRECTLY HELD THAT § 5310 SECURES FOR RESPONDENTS THE RIGHT TO BE PAID AT PREVAILING WAGE RATES DETERMINED BY THE SECRETARY OF LABOR.**

This Court has held that in determining whether a federal statute secures a substantive "right" within the meaning of § 1983, a court should determine whether the provision in question was intended to benefit the

putative plaintiff; whether it creates an unambiguous, binding obligation on the defendant against whom relief is sought; whether the obligation is a substantive one (or merely requires procedural conduct); and whether the interest asserted by the plaintiff is susceptible of judicial enforcement (or is so vague that it is beyond the competence of the judiciary to enforce). Suter, 112 S. Ct. at 1367, 1369; Wilder, 496 U.S. at 509; Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989); Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 430-432 (1987).

The courts below faithfully and correctly applied these criteria. See A15-18 and A49-61. The persons to be benefitted are specifically identified: they are "laborers and mechanics."

(A17). The congressional objective was to provide such persons with higher wages than they would be entitled to receive absent § 5310. (A54). Hence, § 5310 was clearly intended to benefit such persons. (A18). Section 5310 "is not merely a hortatory 'reasonable efforts' provision." (A17). Rather, it creates "an obligation that is cast ... in mandatory terms." (A18). Use of the term "shall" indicates Congress sought to create a binding obligation. (A60). Section 5310 is not merely a procedural provision requiring inclusion of wage terms in a state plan (or contract); rather, it imposes on the employer the substantive requirement that workers "shall be paid" at no less than prevailing wage rates. (A17). Thus, § 5310 falls on the substantive side of

the substantive/procedural dichotomy drawn explicitly in Suter and implicitly in Wilder. (A61).

The duty imposed by § 5310 "is neither vague nor speculative nor [like the obligation in Suter] left for determination by the states." (A18). "There is no ambiguity. The contractor is required to pay such workers wages at rates not lower than the federally recognized prevailing rates." (Id.). The obligation § 5310 creates "is determinable by reference to an unambiguous specified standard set by a federal official - the Secretary of Labor." (Id.). "[U]nlike the 'reasonable efforts' clause" in Suter, § 5310 creates "an unambiguous, specific benchmark." (A61). Because the Secretary of Labor predetermines wage

levels "with great specificity" (A60-61), "[t]he contractor knows exactly what wage rates will need to be paid." (A61). Accordingly, § 5310 is unambiguous and susceptible of judicial enforcement.

The assertion that respondents are not intended beneficiaries of Title I of the HCDA misses the mark. See CPC's Petition For Writ of Certiorari ("CPC") at 46, 47; Municipal Defendants' Petition For Writ of Certiorari ("City") at 24. The issue is whether respondents are among the intended beneficiaries of the command in § 5310 that laborers and mechanics "shall be paid" prevailing wages. That the overall objectives of a federal law may be broader than the purpose of a particular section therein does not mean the former may be substituted for the latter. See, e.g., West Virginia

University Hospitals, Inc. v. Casey, 885 F.2d 11, 20 (3d Cir. 1989), cert. denied, 496 U.S. 936 (1990), where in upholding a § 1983 action to enforce the Boren Amendment, the Court held that the relevant issue was "the specific purpose of § 1396(a)(13)(A)," not "the broad purpose of the Medicaid Act as a whole."

Contrary to the City's assertion (City at 11, 24), the courts below read § 5310 in light of Title I as a whole. See, e.g., A59 (conclusion that respondents are among intended beneficiaries of § 5310 is "entirely consistent with the overall congressional purpose in enacting Title I of the HCDA"). The District Court quoted the language of 42 U.S.C. § 5301(c), which provides that "[t]he primary objective of [Title I] is the development of viable urban communities,

by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." (A59, emphasis by Court). See also A10 (Court of Appeals quoting same language).

> There can be little doubt that, if CPC had paid the prevailing wage, rather than the substantially lower wage actually paid to plaintiffs, this would have provided expanded economic opportunities for persons of low or moderate income, namely plaintiffs.

(A59).

Petitioners concede that 40 U.S.C. § 276a(a), the Davis-Bacon statute, was "designed for the benefit" of workers. (City at 26 (quoting United States v. Binghamton Construction Co., 347 U.S. 171, 178 (1954)). Davis-Bacon benefits workers indirectly: it imposes a procedural obligation on a federal agency to include a prevailing wage provision in

a federal construction contract. See A56-57. By imposing the substantive duty on a contractor to pay prevailing wages, § 5310 benefits workers directly. As Davis-Bacon is "designed for the benefit" of workers, a fortiori § 5310 is too.

Contrary to CPC at 47, the rulings below are not inconsistent with the holding in Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981), that Davis-Bacon did not confer on construction workers a right to be paid prevailing wages. The courts here rejected the relevance of that holding because of the "significant" contrast between the obligation created by statutes like Davis-Bacon and the duty imposed by § 5310. (A55). See also A71 ("fundamental differences" between Davis-Bacon and § 5310) and A77, n.19

("specific language of § 5310 ... differs, in important respects, from the language of the Davis-Bacon Act ..."). See also A17 (distinguishing substantive obligation in § 5310 from procedural obligation to include in a writing a promise to pay prevailing wage rates).

Petitioners' attempt to create a "conflict in principle" between the decisions below and Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 744 (1st Cir. 1986), fails. Latinos involved a different statute and a different issue: whether 42 U.S.C. § 5309 implies a private cause of action, not whether § 1983 provides an express remedy for violation of § 5310. Latinos concluded that Title I of the HCDA was not enacted for the "especial benefit" of the

minority community and, hence, minority plaintiffs did not have an implied cause of action to enforce § 5309's generalized prohibition on discrimination. As Judge Ward noted, Latinos is plainly distinguishable. (A58-59). Unlike § 5309, § 5310 specifically identifies the narrow class of its beneficiaries, to wit, "laborers and mechanics." And, as § 5301(c) shows, Title I was intended in part to benefit respondents.

The City also argues that the mere availability of an administrative enforcement mechanism precludes the existence of a § 1983 right. (City at 16). This confuses two conceptually distinct matters: (a) a legal right and (b) the redress available for the violation of a right. The City cites Suter to support its argument but takes

the discussion therein out of context. In Suter, the plaintiffs argued that unless the statute at issue were construed to impose a substantive "reasonable efforts" obligation, rather than a procedural obligation to include in a plan a provision that "reasonable efforts" would be made, the statute would be rendered a "dead letter." In rejecting this argument, this Court noted that an administrative enforcement mechanism was still available even if the statute only created a procedural obligation, and hence this argument in favor of a substantive obligation was incorrect. See 112 S. Ct. at 1368-1369.

Respondents need not and do not make such an argument in order to show that § 5310 imposes a substantive obligation to pay prevailing wages. Hence, the

refutation in Suter of the "dead letter" argument is not pertinent here.

## II.

**THE COURTS BELOW CORRECTLY HELD THAT CONGRESS HAS NOT FORECLOSED RELIANCE ON § 1983 TO REMEDY VIOLATIONS OF § 5310 WHERE THE RELEVANT CONSTRUCTION CONTRACTS REQUIRE PAYMENT OF WAGES AT NOT LESS THAN FEDERAL PREVAILING WAGE RATES.**

CPC states that this Court should grant certiorari

> to now decide, in the context of section 5310 and federal housing policy, the question it previously left open in Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981) -- namely, whether the Davis-Bacon Act creates a private right of action, albeit asserted procedurally here under section 1983, to enforce a contract that contains specific Davis-Bacon Act prevailing wage stipulations.

(CPC at 13-14). With all respect, this is obfuscation.

This case does not involve a claim

under the Davis-Bacon Act, nor is that Act in any material way comparable to § 5310, the statute invoked by respondents. Second, the issue whether Davis-Bacon (or any other prevailing wage statute) implies a private cause of action is fundamentally different than the issue actually presented here, namely, whether the express cause of action created by § 1983 is available to remedy the deprivation of respondents' rights under § 5310.

Davis-Bacon's prevailing wage clause, 40 U.S.C. § 276a(a), obligates a contracting federal agency to include in its advertised specifications and its resulting contracts a provision requiring the payment of wages at not less than prevailing wage rates. (A4A). In contrast, § 5310 imposes a duty on a

contractor doing work for a local government to pay workers at not less than prevailing wage rates. Davis-Bacon and § 5310 thus differ significantly. See A55, 71, 77, n.19.

Whether a federal statute impliedly creates a private cause of action to remedy a violation of that statute is "a different inquiry" than whether § 1983 is available to remedy that same violation. In the former case, the burden is upon the plaintiff to show Congress intended to create a private remedy. In the latter, it is presumed from § 1983's express language that a remedy is available and the burden is upon the defendant to demonstrate that Congress affirmatively withdrew the § 1983 remedy. Wilder, 496 U.S. at 508-09, n.9. Thus the argument that Congress "did not

intend to create any private right of action" in enacting Title I (CPC at 26), see also id. at 42-43, is irrelevant. Respondents do not seek review of the dismissal of their claims asserted directly under § 5310. Thus, the pertinent question is not whether Congress intended to create a new cause of action, but whether it affirmatively withdrew the cause of action available under § 1983.

Where, as here, there is no express withdrawal of the § 1983 remedy, private enforcement of § 5310 under § 1983 may not be denied unless Title I itself created a remedial scheme sufficiently comprehensive to demonstrate congressional intent to preclude relief under § 1983. In particular, petitioners must demonstrate that allowing

respondents to pursue their § 1983 claims would be "inconsistent" with the scheme created by Title I, that the latter "left no room" for a § 1983 remedy. Suter, 112 S. Ct. at 1368, n.11; Golden State, 493 U.S. at 106-107; Wright, 479 U.S. at 423.[2] The courts below correctly concluded that petitioners failed to satisfy this test. (A18-21, A61-71).

Petitioners argue that allowing a § 1983 suit here would undercut CPC's interest in knowing in advance its approximate labor costs and invoke Coutu, supra, to support this contention. (CPC

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[2] The relevant enforcement scheme is the regulatory scheme in 29 C.F.R. Part 5, not the statutory scheme in Davis-Bacon, 40 U.S.C. § 276a-1 et seq. Compare CPC at i, 27-28. Section 5310 incorporates the wage rate determinations by the Secretary of Labor pursuant to Davis-Bacon, but it does not incorporate that Act's enforcement scheme. Glenn Electric Co. v. Donovan, 755 F.2d 1028, 1031-33 (3d Cir. 1985).

at 29-31; City at 18-19). This argument was disposed of by the courts below:

> In the instant case, the predetermination of prevailing wage rates by the Secretary of Labor provided CPC with certainty when preparing its bid. Plaintiffs do not challenge the Secretary's determination in this regard. Any private enforcement, pursuant to § 1983, of the contractor's obligation to pay would not upset the contractor's interest in having a predetermined wage rate to factor into a bid. Thus a private right of action pursuant to § 1983 does not upset the balance of Congress' "carefully tailored scheme" that is at the heart of § 5310.

(A66-67) (emphasis in original). Coutu held that Davis-Bacon does not imply a private cause of action to recover wages at prevailing rates where it has already been determined administratively that Davis-Bacon does not apply to the work in question. As the Second Circuit observed: "Coutu's concern for the contractor's need to know in advance its

labor costs is not an issue here, since the Contracts expressly required the payment of wages at Davis-Bacon levels." (A21). See also A67-68.

CPC executed contracts which were expressly subject to Title I, which expressly required that respondents be paid prevailing wages, and to which were attached prevailing wage rates determined by the Secretary of Labor. As alleged in the First Amended Complaint, CPC's failures to pay respondents prevailing wages were "willful" (37, 40). On these facts, it is disingenuous at best to claim that CPC did not know in advance its approximate labor costs or that its obligation to meet those costs was "unexpected." (City at 18, 19).

Petitioners argue a § 1983 cause of action would be inconsistent with the

express purpose of Reorganization Plan No. 14 (A111), incorporated into § 5310, to "assure coordination of administration and consistency of enforcement of" federal labor standards. (CPC at 24-25). This argument was expressly rejected by the District Court. (A68-69). The Message of the President which accompanied Plan No. 14 provided:

> The methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity of enforcement is lacking and the degree of protection afforded workers varies from agency to agency.
>
> In order to correct this situation, this plan authorizes the Secretary of Labor to coordinate the administration of legislation relating to wages and hours on federally financed or assisted projects by prescribing standards, regulations and procedures to govern the enforcement activities of the various federal agencies ....

Message of the President, 5 U.S.C. App.

(emphasis added). (The Message of the President is reprinted in the appendix hereto.)

> [T]he President's transmittal message makes clear [that] this "consistency of enforcement" refers to a consistent approach to enforcement across government agencies, and thus would not preclude private enforcement.
>
> * * *
>
> Thus, the Reorganization Plan was designed to remedy inconsistent application of federal labor standards by federal administrative agencies. This congressional and presidential interest in a uniform approach to enforcement by federal agencies would not be undermined by a § 1983 right of action. Certainly there is no evidence that Congress or the President even considered private enforcement when they placed the "consistency of enforcement" language in the Reorganization Plan.

(A68, 69) (emphasis in original).

Unlike Davis-Bacon, see 40 U.S.C. § 276a-2(b) (CPC at 4C), the HCDA does not authorize a private action on a bond

to recover wages due. Petitioners concede that neither the HCDA, Reorganization Plan No. 14 nor the Secretary of Labor's regulations provides workers with any private cause of action to recover prevailing wages. (CPC at 16, 25, 42).[3] CPC's argument, that omission from the HCDA of any private judicial remedy supports the conclusion that Congress foreclosed resort to § 1983 to enforce § 5310 (CPC at 17), turns this Court's jurisprudence on its head. It is

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[3] The only suit authorized by the HCDA is an action by the Attorney General under 42 U.S.C. § 5311(b) against a "recipient of assistance." The latter is the state or local government which has received federal financial assistance, not, as CPC apparently wishes, a contractor which has violated § 5310. Compare CPC at 43-44. A recipient may be sued under § 5311(b) only for its own violation of Title I. Respondents do not contend that the City violated Title I, only that it caused CPC to violate CPC's duty under Title I.

the presence in the underlying statute of a specific private judicial remedy which may permit the inference that Congress intended to foreclose resort to § 1983. E.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 13-14, 20-21 (1981). Omission from the HCDA of any private judicial remedy supports resort to § 1983.

Nor is a private remedy to recover prevailing wages available under the regulatory scheme. Title 29 C.F.R. § 5.11(a)(1992) provides:

> This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor(s).

(Emphasis added). Thus, employees may

complain all they want of an employer's violation of § 5310, cf., CPC at 41-42; City at 13, but they have no ability to initiate an administrative proceeding to obtain redress. (A19-20, A69-70). Indeed, at the time the HCDA was enacted, regulations permitted only the contract-administering agency to initiate such proceedings. (A20). See 29 C.F.R. § 5.11(b)(1974) (A128).

Petitioners say that "[a]fter the ALJ renders a decision" in a § 5.11(a) proceeding, laborers and mechanics may appeal the ALJ's decision. (CPC at 14, n.6; CPC at 41). Of course, this assumes there is such a proceeding. Moreover, any appeal would be discretionary, 29 C.F.R. § 7.1(b), and the Wage Appeals Board ordinarily does not consider matters de novo. (29 C.F.R. § 7.1(e)).

Thus, even if workers are allowed an appeal, it would be on the basis of a record developed in a proceeding in which they were not parties.[4]

The availability of administrative mechanisms to protect a plaintiff's interest does not suffice to demonstrate that Congress intended to foreclose a § 1983 remedy. Golden State, 493 U.S. at 106. Petitioners' reliance on regulations permitting withholding, suspension or termination of contract funding and the like (CPC at 37; City at

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[4] The regulations pertaining to a "DOL-directed" hearing "at the initial contracting stage" (CPC at 39), see 29 C.F.R. Part 1, have no probative value or even relevance here. As petitioners' euphemism ("DOL-directed") suggests, a worker may not initiate such a hearing. No such hearing was in fact initiated by anyone here. Moreover, the Part 1 regulations concern individual wage rate determinations, determinations which respondents do not challenge.

14) is unavailing. Such enforcement mechanisms do not prove an intent to foreclose resort to § 1983. Wilder, 496 U.S. at 521-522; Wright, 479 U.S. at 428.

The assertion that courts will enjoin entire HCDA projects, if § 1983 actions to enforce § 5310 are brought, borders on the frivolous. (CPC at 36). There is no reason to think laborers or mechanics would seek to halt their own employment or why courts, faced with contractor violations of § 5310, would enjoin such employment, rather than order the contractor to pay prevailing wages.

## III.

**THE COURTS BELOW CORRECTLY HELD THAT RESPONDENTS PRESENT SUFFICIENT FACTS FROM WHICH IT MAY BE FOUND THAT PETITIONERS ACTED UNDER COLOR OF STATE LAW.**

The close nexus test "establishes a relatively small range" (A44) of conduct by a private entity that is properly deemed under color of state law for purposes of § 1983. The courts below held that a sufficient nexus between acts of a private party and a government is not established merely because a private entity is affected with the public interest; or that a state has approved or acquiesced in the initiatives of the private entity; or that the private entity is subject to extensive regulation or is publicly subsidized or has been given monopoly status. (A22, A44). Of particular relevance, both courts noted

that acts of a private contractor do not become governmental action by reason of the contractor's substantial or total engagement in performing public contracts. (A22, A44). At the same time, both recognized that conduct of a private entity may be deemed under color of state law when a government has coerced or substantially encouraged that conduct. (A22-23, A44-45).

Those courts faithfully applied this Court's precedents, thereby rendering petitioners' objection an essentially fact-bound complaint. Conduct of a private entity is properly deemed governmental action or action under color of law when coerced or substantially encouraged by a government. E.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614-616 (1989); Blum

v. Yaretsky, 457 U.S. 991, 1004 (1982). The facts justifying a finding of municipal coercion or substantial encouragement of CPC's failure to pay respondents prevailing wages are detailed by the Court of Appeals (A5-6, 23) and need only be summarized here.[5] HPD's bid solicitations provided that the overall budget for each construction contract would be determined by a "Person-Day Rate," multiplied by the number of workers, multiplied by the number of days worked. The "Person-Day Rate" included not only wages but all other costs of running the program. HPD expressly

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[5] As the issues here arise on an interlocutory appeal from the denial of motions brought pursuant to Fed. R. Civ. P. 12(b)(6), the precise question is whether "it appears beyond doubt that [respondents] can prove no set of facts in support of [their] claim which would entitle [them] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

placed a ceiling on the Person-Day Rate for each contract which was so low that there were not enough contract funds to pay laborers and mechanics federally mandated prevailing wages. Further, HPD expressly forbade CPC from obtaining additional funding for the contract work. In the words of the Court of Appeals:

> Thus, to win the Contracts, CPC was required to make its bids based on wages below [prevailing wage] levels; it was paid a sum that did not give it sufficient funds to pay wages at the § 5310-required minimum levels; and it was prohibited by the Contracts from receiving any additional funding for the work performed thereunder.

(A23). See also A46-47.

CPC effectively concedes that the City coerced its violations of § 5310. In its First Amended Answer, para. 104, CPC states: "CPC was required by the City and HPD under each master agreement to pay plaintiffs less than prevailing

wages." (931). In a memorandum, CPC stated: "[T]he City effectively prohibited CPC from paying the participants anything approaching prevailing wage rates." (904). See also CPC at 51 (Person-Day Rate was "set by the municipality so low as to make it financially impossible [for CPC] to pay prevailing wages").

Contrary to CPC at 57, a private entity is not subjected to vicarious liability under the close nexus test. CPC is subject to liability under § 1983 for its own conduct, to wit, its failure to pay employees prevailing wages. See Skinner, supra (acts of private employer substantially encouraged by government may subject employer to liability in suit by employees challenging those acts as governmental action).

CPC argues that the municipal defendants acted under color of federal, and not state, law. (The City itself eschews this argument.) The City's challenged conduct included its imposition of a ceiling on the Person-Day Rate. As the Second Circuit noted, placing a cap on this budget-determining factor was "an attempt by the City to limit any call upon its own treasury for the projects in question." (A24). The municipal conduct which caused CPC's violations of § 5310 resulted from the City's own financial concerns: the City acted to assure that project costs would not exceed the federal monies it was receiving under the HCDA. The City's challenged acts "were not required by any federal provision". (A24). To the contrary, by its terms, § 5310

contemplates HCDA projects financed "in whole" or merely "in part" with federal assistance. Hence, § 5310 expressly permits projects financed in part with municipal funds. It follows that the City's challenged conduct undertaken to assure its own funds would not be expended did not occur under color of federal law for purposes of § 1983.[6]

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[6] Dixson v. United States, 465 U.S. 482 (1984), on which CPC relies (CPC at 60-62), is plainly distinguishable. Dixson was a criminal case which involved neither § 5310 nor § 1983. Because Dixson had "official federal responsibilities" under the HDCA, this Court held that he acted "for or on behalf of the United States" within the meaning of 18 U.S.C. § 201. However, a person does not act under color of law within the meaning of § 1983 simply because (s)he has assumed governmental responsibilities: there must be a close nexus between the government and the particular conduct challenged. Blum, 457 U.S. at 1004 (quoting Jackson, 419 U.S. at 350. Thus, assuming arguendo that the municipal petitioners generally acted "for or on behalf of the United States" within the meaning of § 201, such a

## IV.

## THE DECISIONS BELOW DO NOT WARRANT REVIEW BY THIS COURT.

The municipal petitioners suggest that denial of certiorari will result in a flood of § 1983 claims for prevailing wages under § 5310 and/or substantially identical prevailing wage statutes. (City at 20-23). They also claim a need to resolve purported confusion among lower courts as to the proper test for § 1983 enforcement of federal statutes. (City at 27-28). Neither of these assertions supports review by this Court of the Second Circuit's judgment.

As to petitioners' "doomsday scenario" (A77, n.19), a court may not nullify

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conclusion would not convert the specific municipal actions challenged here into action under color of federal law for purposes of § 1983.

respondents' otherwise meritorious § 1983 claims because a case might, theoretically, invite other such claims. (Id.). Moreover, petitioners' scenario is theoretical at best. The HCDA was enacted almost twenty years ago. Not only is the Second Circuit's judgment not in conflict with any decision of another court, research has not disclosed a single other case in which enforcement of § 5310 pursuant to § 1983 has been sought.[7]

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[7] The lack of such § 1983 claims was not due to a belief that § 1983 did not provide a remedy for violations of statutes such as § 5310. As early as 1947, the Second Circuit, per Learned Hand, held that § 1983 provides a remedy for violations of federal statutes generally. Bomar v. Keyes, 162 F.2d 136, 139 (2d Cir.), cert. denied, 332 U.S. 825 (1947). By 1974, the year of enactment of the HCDA, several other courts of appeals had reached the same conclusion. Blue v. Craig, 505 F.2d 830, 834-838 (4th Cir. 1974); Anderson v. Graham, 492 F.2d 986 (8th Cir. 1973); Gomez v. Florida State Employment Service, 417 F.2d 569, 579 (5th Cir. 1969).

Of the approximately sixty prevailing wage laws enacted by Congress since 1931, petitioners cite six extant statutes which, like § 5310, provide that workers "shall be paid" prevailing wages. See, e.g., City at 20-21.[8] However, there is

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[8] Petitioners also refer to four other provisions to which, they say, the Second Circuit's reasoning would apply: National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. § 954(n); Older Americans Act of 1965, 42 U.S.C. § 3027(a)(14)(D); Solid Waste Disposal Act, 42 U.S.C. § 6979; Hospital Survey and Construction Act, 42 U.S.C. § 291e(a)(5). Unlike § 5310, however, these provisions do not impose a duty on a contractor to pay workers at not less than prevailing wage rates. Three impose on an applicant for federal monies the obligation to furnish to the relevant federal agency an adequate or reasonable assurance that workers will be paid prevailing wages. The fourth of these, 42 U.S.C. § 6979, prohibits the federal agency from awarding a grant unless the appropriate federal official finds that the application therefor contains or is supported by such an assurance. (A118-121). As explained above, such procedural obligations are plainly distinguishable from § 5310.

not one case in which § 1983 has been invoked to enforce any of these similar provisions. And what was true before the decisions below remains true today: in the more than sixteen months since Judge Ward rendered his opinion denying dismissal of respondents' § 1983 claims, there has not been any other § 1983 litigation to enforce § 5310 or any comparably-worded statute.

The reason for the lack of such litigation is the difficulty of satisfying § 1983's 'under color of state law' requirement. Section 5310 and similar provisions impose a duty on a private contractor. The standard for rendering conduct of a private contractor subject to § 1983 "is a difficult one to attain". (A43). The circumstances evidencing the City's coercion and

substantial encouragement of CPC's violations of § 5310 are unique and unlikely to be duplicated by other local governments. Petitioners' prediction of a wave of § 1983 claims to enforce prevailing wage laws is overblown.

The City's claim of lower court "uncertainty" concerning the "proper framework" for § 1983 enforcement of federal statutes is also hyperbole. The opinions cited by the City show consistent adherence to the criteria set forth in Suter and prior precedents, including Wilder. See pages 20-21 supra. In each case, the court dismissed a § 1983 claim for failure to satisfy one or more of those criteria. Rather than manifesting "confusion", the decisions cited actually show the lower courts have been applying the very same criteria as

did the courts in the instant case.

## CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Dated: October 21, 1993

Respectfully submitted,

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**MESSAGE OF THE PRESIDENT**, 5 U.S.C. App.

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949.

To the Congress of the United States:

I transmit herewith Reorganization Plan No. 14 of 1950, prepared in accordance with the provisions of the Reorganization Act of 1949. For the purpose of coordinating the administration of labor standards under various statutes relating to Federal construction and public works or to construction with federally financed assistance or guaranties [sic], the reorganization plan authorizes the Secretary of Labor to prescribe appropriate standards, regulations, and procedures with respect to these matters and to make such investigations concerning compliance with, and enforcement of, labor standards as he deems desirable. The purpose is to assure consistent and effective enforcement of such standards.

The plan is in general accord with the recommendations of the Commission on Reorganization of the Executive Branch of the Government. It constitutes a further step in rebuilding and strengthening the Department of Labor to make it the central agency of the Government for dealing with labor problems.

After investigation I have found and

hereby declare that the reorganization contained in this plan is necessary to accomplish one or more of the purposes set forth in section 2(a) of the Reorganization Act of 1949.

There are several laws regulating wages and hours of workers employed on Federal contracts for public works or construction. The "eight hour laws" limit the employment of laborers and mechanics on such projects to 8 hours per day and permit their employment in excess of that limit only upon condition that time and one-half the basic-wage rate is paid for the excess hours. The Davis-Bacon Act provides that the minimum rates of pay for laborers and mechanics on certain Federal public-works contracts shall be those prevailing for the corresponding classes of workers in the locality as determined by the Secretary of Labor. The Copeland anti-kick-back law prohibits the exaction of rebates or kick-backs from workers employed on the construction of Federal public works or works financed by the Federal Government and authorizes the Secretary of Labor to make regulations for contractors engaged on such projects.

In addition to the above statutes, there are several acts which require the payment of prevailing-wage rates, as determined by the Secretary of Labor, to laborers and mechanics employed on construction financed in whole or in part by loans or grants from the Federal Government or by mortgages guaranteed by the Federal Government. These acts are: the National Housing Act, the Housing Act of 1949, the Federal Airport Act, and the

Hospital Survey and Construction Act of 1946.

With the exception of the Department of Labor, the Federal agencies involved in the administration of the various acts are divided into two classes: (1) agencies which contract for Federal public works or construction; and (2) agencies which lend or grant Federal funds, or act as guarantors of mortgages, to aid in the construction of projects to be build by State or local public agencies or private individuals and groups. The methods of enforcing labor standards necessarily differ between these two groups of agencies.

The methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity of enforcement is lacking and the degree of protection afforded workers varies from agency to agency.

In order to correct this situation, this plan authorizes the Secretary of Labor to coordinate the administration of legislation relating to wages and hours on federally financed or assisted projects by prescribing standards, regulations, and procedures to govern the enforcement activities of the various Federal agencies and by making such investigations as he deems desirable to assure consistent enforcement. The actual performance of enforcement activities normally including the investigation of complaints of violations, will remain the duty of the respective agencies awarding the contracts or providing the Federal

assistance.

Since the principal objective of the plan is more effective enforcement of labor standards, it is not probable that it will result in savings. But it will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.

HARRY S. TRUMAN

THE WHITE HOUSE,
March 13, 1950.

**Title 29 C.F.R. § 5.11(a) (1992)**

This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor(s).

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